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No. 13133

United States
Court of Appeals
For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

W. T. GRANT COMPANY, a Corporation,
Respondent.

Transcript of Record

Petition for Enforcement of an Order of the
National Labor Relations Board

FILED

JAN - 9 1952

PAUL P. O'BRIEN

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif

CLERK

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NATIONAL LABOR RELATIONS BOARD,

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Transcript of Record

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National Labor Relations Board

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Appearing on Behalf of Charging Party,
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EUGENE M. FOLEY, ESQ.,

1441 Broadway,

New York, New York,

Appearing on Behalf of Respondent.

JAMES P. McLOUGHLIN, and

VICTOR LAZZARO,

84 S. First Street,

San Jose, California,

Appearing for Local 428, AFL.

Form NLRB-501

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

Important—Read Carefully

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions—File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

Do Not Write in This Space

Case No. 20-CA-378.

Date Filed: 5/2/50.

Compliance Status Checked by: 11/15/50 E.S.

1. Employer Against Whom Charge Is Brought:

Name of Employer: W. T. Grant & Co.

Address of Establishment: 146 South First
St., San Jose, Calif.

Number of Workers Employed: 25.

Nature of Employer's Business: Retail Variety Store.

The above-named employer has engaged and is engaging in unfair labor practices within the mean-

ing of section 8 (a), subsections (1) and (5) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge:

(a) That said employer by its officers, agents and employees did, since January 6, 1950, and at all times since that date, have refused to bargain with Retail Clerks Union, Local 428, notwithstanding the fact that said Union is the sole bargaining agent of its employees.

(b) That on various dates since January 6, 1950, said employer has by its acts and conduct interfered with, restrained and coerced its employees in the exercise of their rights as guaranteed by Section 7 of the Act.

3. Full Name of Labor Organization, Including Local Name and Number, or Person Filing Charge:

Retail Clerks Union, Local 428.

4. Address:

84 So. First Street, San Jose, California.
Telephone No: Cypress 3-2020.

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit:

Retail Clerks International Association, AFL.

6. Address of National or International, if any:

Lafayette, Indiana.

Telephone No:

7. Declaration:

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ JAMES P. McLOUGHLIN,
(Signature of Representative of
Person Filing Charge.)
Secretary-Treasurer.

May 2, 1950.

Willfully false statements on this charge can be punished by fine and imprisonment (U.S. Code, Title 18, Section 80.)

[Received in evidence as General Counsel's Exhibit No. 1, Nov. 13, 1950.]

Form NLRB-501

United States of America
National Labor Relations Board

FIRST AMENDED
CHARGE AGAINST EMPLOYER

Important—Read Carefully

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions—File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

Do Not Write in This Space

Case No. 20-CA-378.

Date Filed: 8/9/50.

Compliance Status Checked by: 11-15-50 E.L.

1. Employer Against Whom Charge Is Brought:

Name of Employer: W. T. Grant Company.

Address of Establishment: 146 South First Street, San Jose, California.

Number of Workers Employed:

Nature of Employer's Business: Retail Variety Store.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (5) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge:

On or about January 25, 1950, it, by its officers, agents, and representatives, intimidated its employees by questioning them concerning their union activities; on or about February 22, 1950, it further interfered with employees' rights to bargain collectively by unilaterally granting a general wage increase, and on or about April 30, 1950, it threatened

to close its store rather than to submit to operation of a "union-shop" establishment.

On or about January 25, 1950, it, by its officers, agents and representatives refused to bargain collectively with Retail Clerks Union 428, a labor organization chosen by a majority of its employees in an appropriate unit for purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment.

By the above acts and by other acts and conduct, it, by its officers and agents, restrained and coerced employees and is restraining and coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

3. Full Name of Labor Organization, Including Local Name and Number, or Person Filing Charge:

Retail Clerks Union, Local 428.

4. Address:

84 South First Street, San Jose, California.

Telephone No: Cypress 3-2020.

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit:

Retail Clerks International Association, AFL.

6. Address of National or International, if any:

Lafayette, Indiana.

Telephone No:

7. Declaration:

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ FRANCIS J. McTERNAN, JR.,
(Signature of Representative of
Person Filing Charge.)

Attorney for Retail Clks.
Union, Loc. 428.

Aug. 8, 1950.

Willfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 80.)

[Received in evidence as General Counsel's Exhibit No. 5, Nov. 13, 1950.]

United States of America, Before the National
Labor Relations Board, Twentieth Region

Case No. 20-CA-378

In the Matter of
W. T. GRANT COMPANY
and
RETAIL CLERKS UNION, LOCAL 428, A.F.L.

COMPLAINT

It having been charged by Retail Clerks Union, Local 428, A.F.L., that W. T. Grant Company has engaged in, and is now engaging in, certain unfair labor practices affecting commerce as set forth in

the National Labor Relations Act, as amended, 29 U.S.C.A. 141, et seq. (Supp. July, 1947), herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twentieth Region, designated by the Rules and Regulations of the National Labor Relations Board, Series 5, as amended, Section 203.15, hereby issues this Complaint and alleges:

I.

W. T. Grant Company, herein called the Respondent, is a Delaware corporation with its corporate office in Delaware and its executive offices in New York, New York. Respondent is engaged in the business of selling and distributing merchandise in various states of the United States and owns and operates retail stores in various states of the United States, including the State of California.

II.

(a) Only the retail store owned and operated by the Respondent and located in San Jose, California, is involved in this proceeding.

(b) During the fiscal year ending January 31, 1950, the Respondent purchased merchandise for sale at retail at its San Jose, California, store valued in excess of \$100,000.00, of which amount approximately 90 per cent was shipped to said store from points located outside the State of California.

III.

Retail Clerks Union, Local 428, affiliated with the

American Federation of Labor, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

IV.

All employees at Respondent's San Jose, California, store, excluding supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

V.

At all times material to the issues herein, a majority of the employees of Respondent in the appropriate unit as set forth in paragraph IV, above, designated the Union as their representative for the purposes of collective bargaining with the Respondent, and at all times material to the issues herein, the Union has been the representative for the purposes of collective bargaining of the majority of the employees in said unit and by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all the employees in said unit for the purposes of collective bargaining in regard to rates of pay, wages, hours of employment, and other conditions of employment.

VI.

On or about January 25, 1950, and at all times thereafter up to and including the date hereof, Respondent, through its officers, agents and representatives, did fail and refuse, and continues to fail and refuse to bargain collectively with the Union

as the exclusive representative of all the employees in the appropriate unit above described in respect to rates of pay, wages, hours of employment, and other conditions of employment.

VII.

At various times in or about February, 1950, and thereafter, the Respondent by and through its officers, agents and representatives, engaged in the following acts and conduct:

(1) Interrogated employees as to their union affiliations;

(2) Interrogated employees as to their union activities;

(3) Offered and granted a unilateral wage increase to their employees;

(4) Offered and granted to their employees a reduction in the work week;

(5) Threatened to close their store and cease operations in San Jose, California, if the store was organized by the Union.

VIII.

By the acts set forth in paragraph VI, above, the Respondent did engage in, and is now engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

IX.

By the acts set forth in paragraphs VI and VII (1) to (5), both inclusive, above, the Respondent did interfere with, restrain, and coerce, and is interfering with, restraining, and coercing, its em-

ployees in the exercise of their rights guaranteed them by Section 7 of the Act, and did thereby engage in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

X.

The acts of the Respondent, set forth in paragraphs VI and VII (1) to (5), both inclusive, above, occurring in connection with the operations of the Respondent described in paragraphs I and II (a) and (b), both inclusive, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states of the United States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

XI.

The aforesaid acts of the Respondent, as set forth in paragraphs VI and VII (1) to (5), both inclusive, above, and each of them, constitute unfair labor practices within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, on this 31st day of August, 1950, issues this, his Complaint, against W. T. Grant Company, Respondent herein.

[Seal] /s/ GERALD A. BROWN,
Regional Director, National Labor Relations Board,
Twentieth Region.

Received in evidence as General Counsel's Exhibit No. 6, Nov. 13, 1950.

United States of America, Before the National
Labor Relations Board, Twentieth Region

Case No. 20-CA-378

In the Matter of
W. T. GRANT COMPANY
and
RETAIL CLERKS UNION, LOCAL 428, A.F.L.

ANSWER

W. T. Grant Company, the Respondent herein, answering the complaint issued by the General Counsel of the National Labor Relations Board, on behalf of the Board,

First: Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in the paragraph of the complaint designated "III."

Second: Denies each and every allegation contained in the paragraphs of the complaint designated "V," "VII," "VIII," "IX," "X" and "XI."

Wherefore, the Respondent respectfully contends that the complaint herein should be dismissed.

W. T. GRANT COMPANY.
/s/ F. C. LUSTENBERGER,
Executive Vice-President.

Dated New York, N. Y., September 6, 1950.

Received in evidence as General Counsel's Exhibit No. 9, Nov. 13, 1950.

[Title of Board and Cause.]

EXCEPTIONS TO INTERMEDIATE REPORT

W. T. Grant Company, the Respondent herein, hereby takes exception to the Trial Examiner's report and recommended order and specifically excepts:

1. To the Examiner's finding (p. 2, line 60) that none of the authorizations was revoked.

2. To the Examiner's failure to find that to all intents and purposes the authorization signed by Omera Guillory was revoked. (Transcript of Testimony, pp. 79, 184.)

3. To the Examiner's refusal to admit evidence of a conversation between two employees whereby one, in effect, revoked an authorization that she had signed. (Transcript of Testimony, p. 185.)

4. To the Examiner's finding (p. 3, line 10) that on January 5, 1950, the union had "obtained authorizations from a majority of Respondent's employees." (Transcript of Testimony, p. 18.)

5. To the Examiner's denial (Transcript of Testimony, p. 177) of Respondent's motion (Transcript of Testimony, p. 176) to dismiss, for failure of proof, the allegation of the complaint (VII(5)) that the Respondent "threatened to close their store and cease operations in San Jose, California, if the store was organized by the Union."

6. To the Examiner's refusal to find that, on the same page of Respondent's Manual from which the

paragraph "Union's Demand for Recognition" (p. 3, lines 20-38) was taken it is said:

"Manager is not to be curious or in any way interested as to whether an employee does or does not belong to union, or the extent of an employee's union activities. No one is favored because of membership or non-membership in any union."

7. To the Examiner's finding (p. 3, lines 44, 45) that "there was no substantial dispute as to appropriate unit."

8. To the Examiner's finding (p. 4, line 5) that 23 (rather than 13) employees received merit increases during the week ending February 23, 1950.

9. To the Examiner's finding (p. 4, line 11) that "Respondent's store manager admitted that he had never previously, in his experience as manager of the San Jose store, granted so many merit increases at one time."

10. To the Examiner's failure to find that merit increases are generally given in a group (p. 4, line 49).

11. To the Examiner's finding (p. 4, lines 6-8) that the change for thirteen female employees from a 40-hour, 6-day work week, to a 40-hour, 5-day work week was "a change considered desirable by most of the female employees."

12. To the Examiner's finding (p. 5, lines 1-5) that during the week of February 23, 1950, the store

manager bestowed "substantial benefits on a majority of his female employees."

13. To the Examiner's finding (p. 5, line 12) that the store manager bestowed benefits "for the purpose of inducing employees to refrain from or disavow their union affiliation and activities," and "for the purpose of discouraging union affiliation" (p. 5, line 20).

14. To the Examiner's finding (p. 5, line 55) that the Kihs letter (Respondent's Exhibit No. 1) "was in the nature of a report of a union meeting."

15. To the Examiner's failure to find that the Kihs letter (Respondent's Exhibit No. 1) was a report of the union's counter-argument to the effect that if a majority of the employees selected the union as their bargaining agent it would compel Respondent to require all its employees, as a condition of employment, to become union members.

16. To the finding, implicit in the Examiner's statement at line 20, et seq. (p. 7) that Respondent's communications to its employees were robbed of their privilege because of Respondent's failure to produce evidence of probative worth showing that such communications were prompted by and were made in response to inquiries from the employees.

17. To the Examiner's finding that the question as to whether Respondent showed a fixed intention not to bargain on a bargainable subject, i.e., the union shop (p. 6, line 14) is to be determined not

by the language of the notice (G. C. Exhibit No. 56) and the letter (G. C. Exhibit No. 58) but by the impact "upon the minds of the employees" (p. 8, lines 1-9).

18. To the Examiner's finding that the notice (G. C. Exhibit No. 56) and the letter (G. C. Exhibit No. 58) were coercive and therefore not privileged under Section 8(c) of the Act.

19. To the Examiner's refusal to find that on March 16, 1950, the union's business agent (Transcript of Testimony, pp. 83, 89) invaded Respondent's store (Transcript of Testimony, p. 190), disarranged merchandise (Transcript of Testimony, pp. 190, 198, 199, 231, 232) and asked a customer not to patronize the store (Transcript of Testimony, pp. 91, 232).

20. To the Examiner's refusal to find that the statement in the letter of April 27th (G. C. Exhibit No. 58) that "if we can't do business in San Jose on an open-shop basis, we just won't do business in San Jose," followed the misconduct on the part of the union representative set forth in the nineteenth exception.

21. To the Examiner's finding (p. 7, line 50) that the letter of April 27, 1950 (G. C. Exhibit No. 58), was intended to deprive union-minded employees of any hope of achieving union security in the form of a union shop.

22. To the Examiner's finding that it is reasonable to construe the letter of April 27, 1950 (G. C.

Exhibit No. 58), as meaning that Respondent's store "would close before it would be unionized" (p. 8, line 5, et seq.; p. 6, line 29).

23. To the Examiner's failure to find that the letter of April 27, 1950 (G. C. Exhibit No. 58), was designed to prevent coercion of employees.

24. To the Examiner's finding (p. 8, line 18) that the publication of the notice (G. C. Exhibit No. 56) and the letter of April 27, 1950 (G. C. Exhibit No. 58), constituted interference, restraint and coercion within the meaning of Section 8(a)(1) of the Act.

25. To the Examiner's finding (p. 9, line 25) that the assistant manager, Mrs. Kleidon, questioned employees concerning their union activities.

26. To the Examiner's finding that Mrs. Kleidon's comments about union buttons were coercive (p. 9, line 28).

27. To the Examiner's failure to find that Mrs. Kleidon's remarks about the wearing of union buttons were privileged under Section 8(c) of the Act.

28. To the Examiner's finding that Mrs. Kleidon's gratuitous remarks about the wearing of union buttons were made in the scope of her employment (p. 9, line 25).

29. To the Examiner's finding that as a result of Mrs. Kleidon's remarks about union buttons "Respondent interfered with, restrained and coerced

its employees within the meaning of Section 8(a) (1) of the Act (p. 9, line 25).

30. To the Examiner's finding (p. 9, line 51) that the Respondent had no absolute right to have determined by an election the union's claim that it represented a majority of Respondent's employees.

31. To the Examiner's finding that there was no evidence that Respondent had a bona fide doubt that the union represented a majority of its employees (p. 9, line 56).

32. To the finding, implicit in the Examiner's statement, that since there was no evidence that Respondent had a bona fide doubt of the union's majority status it could not properly ask "for proof of such majority" (p. 9, lines 52, et seq.).

33. To the Examiner's finding (p. 10, line 3) that "there was no dispute between the parties on the appropriate unit."

34. To the Examiner's finding (p. 10, line 4) that Respondent's refusal to enter into an agreement for an election, as distinguished from a Board-directed election, "was indicative of a desire and intention to delay the determination of the issue."

35. To the Examiner's finding that Respondent violated Section 8(a)(5) and Section 8(a)(1) of the Act "by refusing to recognize and bargain with the union on January 25, 1950" (p. 10, lines 16-20).

36. To the Examiner's Conclusions of Law numbered 3, 4, 5 and 6 (p. 11, lines 13-34).

37. To the Examiner's refusal to find that when announcing in February, 1950, that some employees would receive merit increases, some others would be promoted to unfilled positions and that the thirteen employees, then working on a 6-day, 40-hour basis, would have their work week changed to a 5-day, 40-hour basis, the Respondent's store manager informed the employees that anyone who wanted to join the union was free to do so. (Transcript of Testimony, p. 109, line 9.)

38. To the amendment of the Complaint during the hearing by adding a subdivision reading as follows:

“(6) Notified the employees of the Respondent's San Jose store and the Union that the Respondent would never bargain about or agree to any Union security for the employees of the Respondent's San Jose store.” (Transcript of Testimony, p. 16.)

39. To the Examiner's sustaining the Union's objection to Respondent's efforts to show that the wage increases it granted to its employees did not bring its scale beyond the going rate. (Transcript of Testimony, p. 49.)

40. To the Examiner's refusal to find that at the meeting of January 25, 1950, the Union and Respondent discussed the company's attitude on compulsory union membership and deferred bargaining on the point pending the determination as to whether the union was or was not the spokesman for the employees. (Transcript of Testimony, p. 32.)

41. To the Examiner's failure to find that on January 25, 1950, Respondent told the union that it did not look with favor on compulsory union membership (Transcript of Testimony, pp. 32, 235), and that the union countered, "We'll never go for that" (Transcript of Testimony, p. 237), or "We just can't go for that" (Transcript of Testimony, p. 203).

42. To the Examiner's failure to find that the union indicated on January 25th a fixed intention to refuse to bargain on a bargainable issue, i.e., the union shop.

43. To the Examiner's refusal to find that those of Respondent's employees who preferred to work on a 5-day, 40-hour week, instead of on a 6-day, 40-hour week could, for the mere asking, have their schedule changed to a 5-day week. (Transcript of Testimony, pp. 141, 161, 164, 182, 197.)

44. To the Examiner's refusal to find that Respondent's employees never manifested to the union any grievance as to a 6-day work week, and the union in turn never discussed the matter with the employees. (Transcript of Testimony, p. 78.)

Respectfully submitted,

W. T. GRANT COMPANY,

By /s/ EUGENE M. FOLEY,

Attorney.

United States of America, Before the National
Labor Relations Board

Case No. 20-CA-378

In the Matter of:

W. T. GRANT COMPANY,

and

RETAIL CLERKS UNION, LOCAL 428, A.F.L.

DECISION AND ORDER

On November 30, 1950, Trial Examiner William E. Spencer issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

The Board¹ has reviewed the rulings of the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Ex-

¹Pursuant to the provision of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

aminer with the modifications and additions set forth below.²

1. The Trial Examiner found, and we unani-
mously agree, that the Union represented a ma-
jority of the Respondent's employees in a certain
appropriate collective bargaining unit on and after
January 25, 1950,³ and that on and after that date
the Respondent refused to bargain collectively with
the Union, in violation of Section 8 (a) (1) and
(5) of the Act. Thus, on January 25, 1950, the
Respondent's counsel, Eugene M. Foley, during a
meeting with the Union, rejected the Union's
several proposed methods for quickly substantiat-
ing its majority and insisted that a petition for
certification be filed with the Board. There would
have been nothing unlawful in the Respondent's
insistence upon a Board election if it had been mo-
tivated by a genuine doubt that the Union repre-
sented a majority of its employees. However, we
cannot find that this was the case. During the week
ending February 23, less than a month later, the
Respondent, without consulting the Union and for

²The Respondent's unopposed motion to correct
the stenographic transcript of the hearing is hereby
granted. Its request for oral argument is denied
because the record, exceptions and brief, in the
opinion of the Board, adequately reflect the issues
and positions of the parties.

³The record reveals, contrary to the Trial Ex-
aminer's findings, that the Union first established
its majority on January 6, 1950, not January 5, .
1950.

the purpose of discouraging union affiliation by its employees, gave alleged merit wage increases or promotions to 23 of the 36 girls on its pay roll and reduced the work week from 6 days to the more desirable 5-day week for 13 of its employees.⁴ Further, as the Trial Examiner found, the Respondent, in violation of Section 8 (a) (1) of the Act, interrogated its employees concerning the wearing of union buttons. In these circumstances we must conclude, as did the Trial Examiner, that the Respondent's insistence upon a Board election was not motivated by a good-faith doubt concerning the Union's majority status, but rather by a desire to gain time to undermine the Union and destroy its majority.⁵

2. A majority of the Panel also agrees with the Trial Examiner that the Respondent violated Section 8 (a) (1) of the Act by notifying its employees in the way it did that it would never agree to a union shop. On February 11, 1950, Store Manager Kihs posted a notice on the store bulletin board advising the employees that the Respondent operated its San Jose store as an open shop and that this policy would not be changed. More important, late in April Kihs specifically emphasized

⁴The granting of these benefits, without consulting the Union, constitutes an independent violation of Section 8 (a) (5) of the Act even without regard to the Respondent's purpose. *The Valley Broadcasting Company*, 87 NLRB 1144.

⁵See *Houston and North Texas Motor Freight*, 88 NLRB 1462, and the cases cited therein.

the Respondent's determination to adhere to this policy, when he called certain individual employees into his office and showed them a letter from Foley which stated that "if we can't do business in San Jose on an open-shop basis, we just won't do business in San Jose."

Like the Trial Examiner, we do not believe that the Board's decision in *M. T. Stevens & Sons Company*⁶ is controlling here. In that case the Board, in the complete absence of any other unfair labor practice, was concerned solely with statements on company policy contained in a letter from the company's treasurer in answer to one written by an attorney who represented a group of employees opposed to unions. These employees reproduced the company's letter in pamphlet form and distributed it in front of the plant 3 days before a Board election. On these facts the Board⁷ held that, although the Respondent had taken the position in its letter that it would not compel an employee to join a union or consent to a check-off against his wishes, "a policy, however strongly held, may, and often does, yield at the bargaining table." In the *Stevens* decision, the Board further said that even if the Respondent's statements amounted to a fixed determination not to bargain on a bargainable subject, in the complete absence of any other unfair labor practice such statements, isolated as they

⁶68 NLRB 229 (1946).

⁷Member Houston dissenting.

were, did not tend to coerce employees within the meaning of the Act.⁸

That is not the case here. Here the Respondent posted the notice of February 11 on its own initiative. Before that notice was posted, the Respondent, as found above, had already violated Section 8 (a) (1) and (5) of the Act by refusing to bargain with the Union. After February 11, the Respondent committed further violations of the Act by interrogating employees concerning their union activities and attempting to dissipate the Union's majority. This was not the law-abiding atmosphere present in the Stevens case. Equally important, here the Respondent backed up its statement of policy with a threat to close its store rather than have a union shop, and it engaged in a course of conduct which was designed to relieve it of the necessity of ever having to yield to the Union on any point or even meet the Union across a bargaining table. In these circumstances we conclude that the posting of the notice on February 11, 1950, and the subsequent threat to close the store rather than grant a union shop, coerced the Respondent's employees in the exercise of the rights guaranteed by Section 7 of the Act.⁹

⁸The complaint in the Stevens case did not allege an unlawful refusal to bargain.

⁹See *Bergmann's, Inc.*, 71 NLRB 1020, 1034, where the Board, in adopting the Trial Examiner's Intermediate Report upon facts like those in the instant case, distinguished its ruling in the Stevens case. See also *United States Gypsum Company*, 90

Order

Upon the entire record in the case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent W. T. Grant Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Retail Clerks Union, Local 428, A.F.L., as the exclusive representative of all employees at its San Jose, California, store, excluding supervisors, with respect to rates of pay, wages, hours of employment, or other conditions of employment.

(b) Conferring benefits on its employees for the purpose of inducing them to refrain from union affiliation and activities; questioning its employees concerning their union activity; threatening to close its San Jose store rather than accede to a union shop; or in any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Retail Clerks

NLRB No. 149; and Augusta Bedding Company, 93 NLRB No. 33.

Our dissenting colleague's references to the anticipatory character of the Respondent's conduct in the absence of a Section 9 (e) election would seem to us more pertinent here if the allegation involved in this portion of the case went to a violation of Section 8 (a) (5) rather than, as it does, on Section 8 (a) (1).

Union, Local 428, A.F.L., or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the National Labor Relations Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Retail Clerks Union, Local 428, A.F.L., as the exclusive representative of all the aforesaid employees with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its San Jose, California, store, copies of the notice attached hereto, marked Appendix A.¹⁰ Copies of the said notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by the Re-

¹⁰In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted in the notice before the words: "A Decision and Order," the words: "A Decree of the United States Court of Appeals Enforcing."

spondent's representative, be posted by Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by other material.

(c) Notify the Regional Director for the Twentieth Region in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

Signed at Washington, D. C., June 7, 1951.

PAUL M. HERZOG,
Chairman.

JOHN M. HOUSTON,
Member.

[Seal] NATIONAL LABOR
RELATIONS BOARD.

James J. Reynolds, Jr., Member, concurring separately and dissenting in part.

I concur in all the findings and conclusions of the majority opinion except as it finds that "the Respondent violated Section 8 (a) (1) of the Act by notifying its employees that it would never agree to a union shop."

I do not believe that under the circumstances of this case, the Respondent's statements can be construed as reflecting an anticipatory refusal to bar-

gain concerning a union shop, for in my opinion—and the Board has not held to the contrary—an employer is under no obligation to bargain concerning a union shop absent the holding of a Section 9 (e) (1) union-shop authorization election among its employees.¹¹ Here, no such election had been held, nor has the Union at any time sought such an election.¹² For that matter, it does not appear that the Union is desirous of negotiating a union-shop agreement. Shrouded by this uncertainty, it is unrealistic to say that the Respondent's pronouncements concerning its union-shop policy now amount to a fixed determination not to bargain at a future appropriate time concerning the union shop. In this situation, therefore, no reason exists for not holding as the Board did in the Stevens case (63 NLRB 229) that "a policy, however strongly held, may, and often does yield at the bargaining table." Contrary to the holding of the majority opinion, the Respondent's other

¹¹See *United States Gypsum Company*, 94 NLRB No. 27, footnote 9.

¹²For this reason, *United States Gypsum Company*, 90 NLRB No. 149, cited in the majority opinion, is distinguishable, as there the respondent's statements were made during the pendency of a petition for a Section 9 (e) (1) union-shop authorization election. Similarly, the *Bergmann* case (71 NLRB 1220) also cited in the majority opinion is inapposite. There the threats concerning union security were made immediately preceding an election, which at that time would have enabled the union, if selected, to bargain for union security. Cf., also, *F. W. Woolworth Co.*, 93 NLRB No. 173.

unfair labor practices do not preclude the application of the Stevens case reasoning, for the Board has held, despite the commission of other unfair labor practices that an employer's statements that it would not be "a party to any agreement" embodying union security did not establish "such a fixed determination by the respondent not to bargain later concerning union security as can reasonably be regarded as constituting interference with the rights of employees within the meaning of Section 8 (1) of the Act."¹³

For the foregoing reasons, I would not find that the Respondent violated Section 8 (a) (1) of the Act by its conduct with respect to the union shop.

Signed at Washington, D. C., June 7, 1951.

JAMES J. REYNOLDS, JR.,
Member.

NATIONAL LABOR
RELATIONS BOARD.

¹³LaSalle Steel Company, 72 NLRB 411, 413. See also Tygart Sportswear Company, 77 NLRB 613, 614, 624, where the Board found that a statement by an employer that the plant would remain an "open shop" did not violate Section 8 (a) (1); and Brown and Root, Inc., 86 NLRB 520, 521, 526, where, despite violations of Section 8 (a) (1) and (5), the Board found that the employer's statement that it "had not worked and would not work under a union 'contract' " was not violative of the Act. Cf. Westinghouse Pacific Coast Brake Company, 89 NLRB No. 16.

Appendix A

Notice to All Employees
Pursuant to
A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not confer benefits upon our employees for the purpose of inducing them to refrain from union affiliation and activities.

We Will Not question our employees concerning their union activities, or threaten to close our San Jose store rather than accede to a union shop.

We Will Not in any other manner interfere with, restrain or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Retail Clerks Union, Local 428, A.F.L., or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such right may be affected by an agreement which requires membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

We Will Bargain collectively upon request with the above-named union as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, wages, hours of employment and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All employees of our San Jose store excluding supervisors as defined by the Act.

All of our employees are free to become, remain or refrain from becoming or remaining members of Retail Clerks Union, Local 428, A.F.L., or any other labor organization, except to the extent that their right may be affected by a lawful agreement which requires membership as a condition of employment.

Dated.....

W. T. GRANT COMPANY,
(Employer)

By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Cause.]

INTERMEDIATE REPORT AND
RECOMMENDED ORDER

Statement of the Case

Upon an amended charge duly filed by Retail Clerks Union, Local 428, AFL, herein called the Union, the General Counsel of the National Labor Relations Board,¹ by the Regional Director of the Twentieth Region (San Francisco, California), issued his complaint dated August 31, 1950, against W. T. Grant Company, San Jose, California, herein called the Respondent, alleging that the Respondent had engaged and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. Copies of the charge, the complaint and a notice of hearing were duly served on the Respondent and the Union.

With respect to unfair labor practices, the complaint alleged in substance that the Respondent refused to bargain with the Union, the duly designated representative of a majority of its employees in an appropriate unit, in violation of Section 8 (a) (5) of the Act, and thereby, and because of specifically enumerated acts, statements, and conduct, interfered with, restrained and coerced its

¹The General Counsel and his representative at the hearing will be called herein the General Counsel; the National Labor Relations Board, the Board.

employees in violation of Section 8 (a) (1) of the Act. In its duly filed answer the Respondent denied the commission of the alleged unfair labor practices. The Respondent's motion for a bill of particulars, referred to the undersigned for ruling prior to the hearing, was granted in part, denied in part.

Pursuant to notice a hearing was held at San Jose, California, on November 13, 14, 1950, before William E. Spencer, the undersigned duly designated Trial Examiner. All parties were represented at and participated in the hearing where full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded them.

At the close of the General Counsel's case-in-chief, the Respondent moved to dismiss certain allegations of the complaint because of failure of proof. The motion was denied. Upon the completion of the evidence, the General Counsel's unopposed motion to conform the pleadings to the proof in formal matters, was granted. The parties waived oral argument before the undersigned but participated in a discussion of issues in response to questions asked by the Trial Examiner. Memorandum briefs have been received from the General Counsel and the Respondent.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

Findings of Fact

1. The business of the Respondent

W. T. Grant Company is a Delaware corporation with an office in Delaware and its executive offices in New York, New York. It is engaged in the business of selling and distributing merchandise in various States of the United States, including the State of California. It operates approximately 495 retail stores which are located in 39 States of the United States. Only its retail store located in San Jose, California, is involved in this proceeding.

During the fiscal year ending January 31, 1950, the Respondent purchased merchandise for sale at its San Jose, California, store valued in excess of \$100,000, of which amount approximately 90 per cent was shipped to said store from points located outside California.

The Respondent admits that it is engaged in commerce within the meaning of the Act.

II. The labor organization involved

Retail Clerks Union, Local 428, AFL, is a labor organization admitting to membership employees of the Respondent.

III. The unfair labor practices

1. The appropriate unit

The complaint alleges, the Respondent admits, and it is found, that all employees at the Respondent's San Jose, California, store, excluding super-

visors as defined in the Act, at all times material herein constituted and now constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

2. The Union's majority

As of the pay roll week ending January 25, 1950, there were 40 employees in the appropriate unit at Respondent's San Jose store. Of these, 21 signed the Union's authorization cards on or before January 5, 1950. These authorizations were never revoked. Respondent's counsel asserted at the hearing that the Union employed coercion in obtaining its majority, but offered no evidence to support the contention. It is immaterial in determining the Union's majority status that some of those signing authorization cards attended no or few union meetings or otherwise indicated a lack of interest in union activities. Accordingly, it is found that on January 25, 1950, and at all times material herein, the Union was, and now is, the exclusive bargaining representative of all the employees in the unit described above.

3. The scope and character of the issue

On January 5, 1950, the Union having obtained authorizations from a majority of Respondent's employees, notified Respondent's store manager, Francis J. Kihs, of its designation as bargaining representative and requested a meeting for the purpose of negotiating a contract. A meeting of the parties was held on January 25, and at this meet-

ing, Respondent's counsel, Eugene M. Foley, declined the Union's proposals for substantiating its majority, and insisted that the Union file a petition for certification with the National Labor Relations Board. Foley stated that this was Respondent's standard procedure in matters concerning representation, and referred to the Respondent's manual which contains the following instructions to store managers:

e. Union's Demand for Recognition

If a union representative claims that he represents employees of our store, Manager informs him that he should submit his evidence to the National Labor Relations Board and petition for an election. If, when making his claim, he hands Manager a form of contract, Manager is to forward it to Personnel Department, New York Office.

Manager is not to examine employees' union membership cards, nor is he to make any attempt to ascertain whether or not a majority of employees have signed cards or to find out what demands will be made by the union. Detailed report of union representative's claims is to be made to Regional Manager and to Personnel Department, New York Office.

The Union agreed to Foley's proposal and on January 31 filed a representation petition with the Board. The Respondent thereafter refused to enter into a consent election agreement for the purpose

of expediting the determination of the representation issue, and insisted on a formal hearing on the Union's petition, although there was no substantial dispute as to appropriate unit. The hearing was held on March 3, and on April 4 the Board issued its Decision and Direction of Election.² The election was thereafter scheduled for May 3, but prior thereto the Union withdrew its petition for certification and filed the unfair labor practice charge upon which this proceeding is predicated.

The basic, though not sole, issue to be determined here is whether the Respondent's refusal on January 25 to recognize the Union until its majority had been established through a Board election was made in good faith, or was a tactical maneuver to afford the Respondent time in which to undermine the Union and destroy its majority.

4. Promotions, wage increases and changes in the work week

During the week ending February 23, of the 36 girls then on Respondent's pay roll, 23 received merit increases; in some instances promotions, also, were involved. At the same time, 13 employees were changed from a 40-hour, 6-day week to a 40-hour, 5-day week, a change considered desirable by most of the female employees. An announcement of this change was made some two weeks earlier. The Union was not consulted on any of these matters.

Kihs, Respondent's store manager, admitted that

²Case No. 20-RC-780.

he had never previously in his experience as manager of the San Jose store, granted so many merit increases at one time, and was unable to recall specifically any prior occasion when such increases had been granted on a group basis.³ His testimony affords no plausible explanation for the timing of these increases.

As to the promotions, Kihs testified that these were made to fill vacancies and that more than a normal number of vacancies had arisen due to marriages and pregnancies among the female employees. His further testimony, however, failed to establish that more than a negligible number of vacancies had arisen at the time the promotions were made effective. He testified that several of the

³Kihs' testimony:

Q. Well, now, limiting the scope of my question to the San Jose store, have you ever granted that many merit increases, or more, at any one time previous to February, 1950?

A. Not to my knowledge.

Q. Did you ever grant as many as a dozen at one time previous to February, 1950?

A. It is possible that I did.

* * *

Q. Now, what has been your practice in the San Jose store; have you normally announced merit increases, one at a time, or more than one at a time? What has been your normal practice over the entire time that you have been at the San Jose store?

A. I would say generally they would be in a group.

Q. Well, can you be a little more specific? Do you have a recollection, in other words, of a group that you gave out any time prior to February, 1950?

A. No, sir.

girls who were promoted had been on a "relief" or probational basis for weeks or months before the promotions were made effective.

As to the change in the work week from 6 to 5 days, it appears that all of the female employees except the 13 affected by the action on the week of February 23, were already working the 5-day week. Kihs testified that he normally honored the request of a female employee to change from a 6 to 5-day week, after she had been in his employ for a time, but he could recall but one employee who had made such a request at the time this change affecting 13 employees was made.⁴

It is clear from Kihs' testimony that his action during the week of February 23 in bestowing substantial benefits on a majority of his female employees, was without parallel in his experience as manager of the San Jose store. Inasmuch as his testimony affords no plausible or convincing explanation for the timing of these benefits, the explanation must be sought elsewhere. On January 31 the Union had filed its petition for certification.

⁴Kihs' testimony:

Q. Do you have any particular explanation—there may be none required—as to why you made this effective as to 13 girls at one time?

A. No, sir.

Q. Do you recall whether or not these particular 13 girls had all requested the five-day week at about this time?

A. No, sir. I can remember one girl distinctly having requested it, but I couldn't remember any more than that one.

There was a reasonable expectation amounting to practically a certainty, that in due course an election would be held to determine the issue of representation. If, in the interim, the employees received many of the benefits which they would hope to gain through union representation, there would be correspondingly less incentive for them to work and vote for the Union. That the bestowal of benefits for the purpose of inducing employees to refrain from or disavow their union affiliation and activities, is violative of the Act, is firmly established in decisions of the Board and the courts. That such was Respondent's purpose in granting benefits to a majority of its female employees during the week ending February 23, is the only reasonable conclusion that can be reached on the basis of the evidence offered in this proceeding. Accordingly, it is found that by the granting of benefits to its employees for the purpose of discouraging union affiliation, the Respondent interfered with, restrained and coerced its employees within the meaning of Section 8 (a) (1) of the Act.

4. Declarations on the union shop

On February 11, 1950, Kihs posted the following notice on the bulletin board at the San Jose store:

There is a rumor that sooner or later you will be required, as a condition of employment, to join a labor union. There Is Not a Grain of Truth in This Rumor. You Don't Have to Join, Nor Need You Refrain From Joining

Any Union to Work at Grants. This Store Is an Open Shop in the True Sense of the Word. It Is Our Policy to Employ Members of Unions as Well as Non-Members and Neither Is Favored Over the Other in Any Aspect of Employment. This Policy Will Not Be Changed.

This notice was copied almost verbatim from Respondent's manual of instructions to its store managers.

Late in April, Kihs called several employees to his office and showed them a letter he had received from Respondent's counsel, Foley. The text of the letter, dated April 27, follows:

I received your letter this morning,⁵ and my inclination was to write to you immediately to the effect that it is settled Company policy that we will not operate a union shop in San Jose or elsewhere. However, in order to make assurance doubly sure, I decided to "check" with Mr. Lustenberger, but I wasn't able to reach him until a few minutes ago.

⁵Kihs' letter to Foley was in the nature of a report on a union meeting. It stated inter alia: "I have received the following information regarding the meeting. Five of my people attended. They were told that in spite of my statement I had made that if the Union gets in this store will be a Union shop and not an open shop." The letter further stated, inter alia, "The above covers pretty much what took place in the meeting. Of course my information is second hand so I am just quoting another person's word."

As a result of my conversation with him I think we can take a definite position to the effect that we will not agree to a union shop in San Jose under any circumstances, and further that if we can't do business in San Jose on an open shop basis, we just won't do business in San Jose. I trust that you still have posted the notice to the effect that no one need join the union in order to work in Grant's. If by chance that notice was taken down I suggest you put it up again.

It is the General Counsel's position that the publication of the aforesaid notice and letter to the employees was violative of the Act inasmuch as they represented a fixed intention not to bargain on a bargainable subject, and had the necessary effect of threatening to deprive the employees of one of the legitimate goals of unionization, the union shop.

It can hardly be disputed that upon compliance with the requirements of Section 8 (3) of the Act by a labor organization, the union shop is a proper subject for collective bargaining. It follows that where these requirements have been met, an employer is under the same duty to bargain in good faith on the union shop as on the subject of wages, hours, or any other condition of employment. It is also true, I think, that any declaration by an employer to his employees that he will not bargain on this or any other proper subject of collective bargaining, amounts to coercion within the mean-

ing of the Act. Our inquiry is now narrowed to the significance of the combined language of the notice and the letter, set forth above, and its reasonable effect on the minds of the employees, with proper reference to such authorities as exist in the matter.

In *M. T. Stevens & Sons Company*, 68 NLRB 229, relied on by the Respondent,⁶ the Board decided that the following statements contained in a letter which was written by an employer to certain of his employees in answer to inquiries addressed to him by those employees, were not violative of the Act:

“* * * at no time will the Company compel an employee to become a member of any particular union as a condition of employment.”

“* * * under no condition will the Company agree to deductions in wages against any employee's wishes to cover dues or assessments.”

The Board in reaching this conclusion stated, *inter alia*:

While we agree with the Trial Examiner that the closed-shop⁷ and check-off are proper sub-

⁶Other decisions considered in reaching the conclusions herein are: *Bergmann's, Inc.*, 71 NLRB 1020; *Julius Cohn d/b/a Comas Manufacturing Company*, 59 NLRB 208; *Cameron Can Machinery Company*, 57 NLRB 1768; *Tampa Electric Company*, 56 NLRB 1270; *Young's Motor Freight Lines*, 91 NLRB No. 226; *Tygart Sportswear Company*, 77 NLRB 613.

⁷This case arose under the Wagner Act.

jects of collective bargaining, we do not believe that, by its statements quoted above, the Respondent did in fact indicate to its employees a fixed determination not to bargain on these matters. The Respondent declared, in response to the inquiries of employees, what its "policy" would be. But a policy, however strongly held, may, and often does, yield at the bargaining table. Thus, in announcing such a policy, the Respondent cannot be regarded as having foreclosed the possibility of future bargaining with respect to the subject matters in question.

But even if we accept the interpretation placed by the Trial Examiner upon the Respondent's statements we do not concur in his conclusion that, in the complete absence of any other unfair labor practice, such statements, isolated as they were, tend to coerce employees within the meaning of Section 8 (1) of the Act.

In the case at bar, there is no evidence of probative worth that the Respondent's notice and letter were prompted by inquiries from interested employees,⁸ and they do not constitute "isolated"

⁸There is no evidence to support Respondent counsel's contention that the Union "threatened" the employees with its declarations on the union shop. Doubtless, it was held out to the employees as one of the goals of unionization. Respondent in its brief filed with the undersigned, appears to attempt to link the Foley letter with alleged miscon-

statements, inasmuch as the Respondent's other conduct during the same period of time is found to have constituted unfair labor practices. These distinguishing factors may be regarded as slight, but are not entirely irrelevant in determining whether the Respondent's notice and letter were coercive, inasmuch as the presence or absence of the element of coerciveness here depends upon the reasonable impact of the combined language of the notice and letter upon the minds of the employees under all attendant circumstances. Thus considered, I am of the opinion that they were coercive and therefore not privileged under Section 8 (c) of the Act.

It can hardly be questioned that an employer is as free to state to his employees his opposition to the union shop as a labor organization is free to advocate it. But the Respondent here has done more than inform its employees on its general policy in such matters. In the February 11 notice, after setting forth a general policy, it stated, unequivocally: This policy will not be changed. The notice standing alone would probably not be violative of the Act, as it is subject to the interpretation that it referred to the closed shop and, in any event, has language that is little stronger, if any, than that found harmless in the *M. T. Stevens & Sons Com-*

duct on the part of a representative of the Union in entering the Grant store and disarranging some of its merchandise. Assuming *arguendo* that the misconduct occurred, it would have no possible bearing on the issue of the union shop.

pany case. But in the Foley letter of April 27, specifically called to the attention of several employees by Kihs, this further supplementary language appears: "[We] will not agree to a union shop in San Jose under any circumstances, and further . . . if we can't do business in San Jose on an open shop basis, we just won't do business in San Jose." If the combined language of this notice and this letter does not portray a fixed intention not to bargain on a bargainable subject, I shall henceforth be somewhat sceptical of language as affording a proper vehicle for the expression of man's thoughts and intentions. I am also of the opinion that it was intended to and had the reasonable effect of depriving union-minded employees of any hope of achieving union security in the form of a union shop. Illustrative of its impact on the minds of the employees, is the unrefreshed recollection of the witness Evelyn De Janvier, a witness who on the whole appeared favorably inclined toward the Respondent, of the contents of the Foley letter shown her by Kihs: "As I recall it, it was that the San Jose store would close before it would be unionized; it would take its business elsewhere." Efforts to obtain the union shop being one of the familiar and legitimate forms of union activities, it is not unusual that the witness should have identified the union shop as unionization itself.

It is true that the Respondent's policy on the union shop might change,⁹ as might its policy on

⁹It appears from statements of counsel that a union shop clause is incorporated in a contract cov-

any other bargainable matter, but its announcement of a fixed intention not to change is none the less coercive because of that. Employee reliance on the imponderables in the face of such pronouncements, would require an act of faith not contemplated by the Statute.

It is found that the publication to the employees of the February 11 notice and the Foley letter of April 27, constituted interference, restraint and coercion within the meaning of Section 8 (a) (1) of the Act.

5. Interrogation of employees concerning their union activities

After the first union meeting certain of the em-

ering the employees at one of Respondent's stores. Whether this indicates that Respondent's policy on the open shop is not a "fixed" one, is best considered in the light of its counsel's statement at the hearing: "As I say, I can negotiate a union shop; I think I have heard all the arguments in favor of a union shop and I have never heard a good one, but where I have negotiated union shops we have come to an agreement, made contracts with unions; none of them contained a union shop agreement except the one in East St. Louis, which is a community contract and which I inherited in 1940." Obviously, we are not concerned here with the merits or demerits of the union shop, but solely with the issue of whether Respondent's declarations on the matter were such that the employees would reasonably believe that the Respondent would refuse to bargain in good faith on the issue. Negotiating on an issue, and bargaining in good faith, needless to say, do not always amount to the same thing.

ployees wore union buttons while performing their duties at the San Jose store.

The assistant store manager, Mrs. Kleidon, commented to Evelyn De Janvier, one of those who had attended the union meeting, that she "had one of those pretty buttons, too." De Janvier testified that the remark was made "kiddingly."

When Nellie Putney wore her union button in the store after returning from her vacation of February 27, Kleidon asked her if she was the only girl in the store that was in the union. Putney testified concerning the incident: "Mrs. Kleidon—just kiddingly, I guess, to keep me from getting embarrassed—asked me if I was the only girl in the store that was in the union—jokingly, you know." The following examination ensued:

Q. And what did you say?

A. I didn't know what to say. I just took the button off.

In April Kleidon asked Martha Nix why she was still wearing her button. The following examination ensued:

Q. And did you make any reply?

A. I said I don't know, because she said it in kind of a joking way.

Nevertheless, thereafter when Nix wore her union button she wore it "on the underneath side" of her sweater.

The wearing of union buttons is a protected form

of union activity, and an employer has no more license to interrogate its employees on their wearing of these buttons than on their other union activities. Such questioning can be, and frequently is, coercive. From the testimony of these witnesses, it may be assumed that Kleidon was a very cordial supervisor. There is no reason to doubt that they were on friendly terms with her. There is good reason to doubt that either Putney or Nix actually regarded Kleidon's remarks and interrogations as merely pleasantries, for following Kleidon's comments they promptly removed their buttons. The testimony of De Janvier, Putney, and Nix that these comments or interrogations, as the case may be, were made "jokingly," was by no means convincing and can best be understood in the light of the promotions which each of them received during the week of February 23.¹⁰

It is found that by Kleidon's questioning of employees concerning their union activities, the Respondent interfered with, restrained and coerced its employees within the meaning of Section 8 (a) (1) of the Act.

6. Other alleged acts of interference,
restraint and coercion

After Victor J. Lazzaro, the Union's business representative, had visited the Grant store in San Jose on one or more occasions, and handed out

¹⁰Each was promoted to a department manager position.

authorization cards to some of the employees, Kihs issued instructions that thereafter the distribution of cards in the store was to be prohibited. The General Counsel argues that such action was violative of the Act. I do not agree. The distribution of such cards in the store has the reasonable effect of interfering with salesgirls in the performance of their duties, and customers in making their purchases, thereby constituting a potential disruption of services. I find that the Respondent's action, in this respect was not violative of the Act.

7. Conclusions on the refusal to bargain

At the meeting of representatives of the parties on January 25, the Respondent, in effect, refused to recognize and bargain with the Union until its majority had been established through a Board election. A Board election is only one of several ways in which the majority status of a labor organization may be determined, and, where only one labor organization is claiming representative status, an employer has no absolute right to have the matter determined by an election. If the Respondent had a bona fide doubt of the Union's majority it might very properly have asked for proof of such majority, and refused proof, might properly have withheld recognition until proof, in one form or another, was furnished it. There is no evidence here that the Respondent had a bona fide doubt of the Union's majority status, and it made its position clear that it would accept no proof of such

majority except through a Board election. The Union complied with its proposal and filed a petition for certification. Thereafter, it sought to expedite a determination of the issue of representation, by offering to enter into a consent election. The Respondent refused to sign such an agreement. Inasmuch as the Respondent did not question the Board's jurisdiction and there was no dispute between the parties on the appropriate unit, its refusal, under the circumstances, was indicative of a desire and intention to delay the determination of the issue. Its purpose in seeking delay became clear when, during the week ending February 23, it conferred substantial benefits on a majority of its employees without consulting the Union, thus undermining the Union as the designated representative of a majority of its employees. Its declarations of a fixed intention never to accede to the union shop and threat that it would close its San Jose store before it would do so, was also deliberately aimed at undermining the confidence of union adherents. These acts of delay, interference and coercion, when related to its refusal to recognize and bargain with the Union on January 25, are conclusive of its lack of good faith on that occasion.

It is found that by refusing to recognize and bargain with the Union on January 25, 1950, the Respondent violated Section 8 (a) (5) of the Act, and thereby interfered with, restrained and coerced its employees in violation of Section 8 (a) (1) of the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in Section III above, occurring in connection with the operations of the Respondent described in Section 1 above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Respondent engaged in unfair labor practices violative of Section 8 (a) (1) and (5) of the Act, the undersigned will recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

Having found that the Respondent refused to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit, the undersigned will recommend that the Respondent, upon request, bargain collectively with the Union as such representative, and if an understanding is reached, embody such understanding in a signed agreement.

The Respondent's refusal to recognize and bargain with the Union, and its efforts to undermine the Union and destroy its majority through acts of interference, restraint and coercion, portray an intention to interfere generally with the rights of its

employees guaranteed by the Act. It will therefore be recommended that the Respondent cease and desist from in any manner interfering with, restraining, and coercing its employees in their right to self-organization.¹¹

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. Retail Clerks Union, Local 428, AFL, is a labor organization within the meaning of Section 2 (5) of the Act.

2. All employees at Respondent's San Jose, California, store, excluding supervisors as defined by the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9 (b) of the Act.

3. On January 25, 1950, Retail Clerks Union, Local 428, AFL, was, at all times since has been and now is, the representative of a majority of Respondent's employees in the appropriate unit described above for purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

4. By refusing on and after January 25, 1950, to bargain collectively with Retail Clerks Union, Local 428, AFL, as the exclusive representative of all its employees in the appropriate unit, the Respondent has engaged in and is engaging in unfair labor

¹¹May Department Stores, 66 S. Ct. 203.

practices within the meaning of Section 8 (a) (5) of the Act.

5. By said refusal, by conferring benefits on its employees for the purpose of inducing them to refrain from union affiliation and activities, by questioning employees concerning their union activities, and by threatening to close its San Jose store rather than assent to the union shop, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, it is recommended that W. T. Grant Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing, upon request, to bargain collectively with Retail Clerks Union, Local 428, AFL, as the exclusive representative of all employees in the appropriate unit at its San Jose, California store, with respect to rates of pay, wages, hours of employment, or other conditions of employment;

(b) Conferring benefits on its employees for the purpose of inducing them to refrain from union affiliation and activities; questioning its employees

concerning their union activities; threatening to close its San Jose store rather than accede to the union shop, or in any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to join or assist Retail Clerks Union, Local 428, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection and to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the National Labor Relations Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Retail Clerks Union, Local 428, AFL, as the exclusive representative of all employees in the appropriate unit at its San Jose, California, store with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement;

(b) Post at its San Jose, California, store copies of the notice attached hereto, marked Appendix A. Copies of said notice to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon

receipt thereof and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by other material.

(c) Notify the Regional Director for the Twentieth Region (San Francisco, California), in writing, within twenty (20) days from the receipt of this Intermediate Report and Recommended Order, what steps Respondent has taken to comply herewith.

It is further recommended that unless the Respondent within twenty (20) days from the receipt of this Intermediate Report and Recommended Order, notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring it to take the action aforesaid.

Dated this 30 day of November, 1950.

/s/ WILLIAM E. SPENCER.

Appendix A

Notice to All Employees

Pursuant to

The Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not in any manner interfere with, restrain or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Retail Clerks Union, Local 428, AFL, or any other labor organization, to bargain collectively through representatives of their own free choice, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such right may be affected by an agreement which requires membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

We Will Bargain collectively upon request with the above-named union as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, hours of employment or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All employees of our San Jose store excluding supervisors as defined by the Act.

All of our employees are free to become, remain, or refrain from becoming members of Retail Clerks Union, Local 428, AFL, or any other labor organization, except to the extent that their right to refrain may be affected by a lawful agreement which requires membership

in a labor organization as a condition of employment.

W. T. GRANT COMPANY,
(Employer.)

By ,
(Representative) (Title)

Dated

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Cause.]

MOTION FOR RECONSIDERATION

Sirs:

Please Take Notice that W. T. Grant Company, the respondent herein, hereby moves the National Labor Relations Board to reconsider that part of its decision dated June 7th, 1951, in which it is found that the respondent violated Section 8 (a) (5) of the Act in the light of the decision of the United States Court of Appeals, Sixth Circuit, in the case of National Labor Relations Board, Petitioner, v. Valley Broadcasting Company, Respondent, decided on or about June 1st, 1951.

Dated New York, N. Y., June 21, 1951.

Yours, etc.,

EUGENE M. FOLEY,
Attorney for Respondent.

To: Office of General Counsel, National Labor Relations Board, 821 Market Street, San Francisco, California;

Francis J. McTernan, Jr., Esq., Dreyfus, McTernan & Lubliner, Esqs., 57 Post Street, San Francisco 4, California.

[Title of Board and Cause.]

ORDER DENYING MOTION

On June 7, 1951, the Board issued a Decision and Order in the above-entitled proceeding, and thereafter, counsel for the Respondent filed a motion to reconsider the aforesaid Decision and Order of the Board in light of the decision of the United States Court of Appeals for the Sixth Circuit in Valley Broadcasting Company,¹ and on July 2, 1951, a Brief in Support of said motion. On June 26, 1951, the Union herein filed a telegram in opposition thereto. The Board having duly considered the matter,

It Is Hereby Ordered that the aforesaid motion be, and it hereby is, denied on the ground that a proper demand for bargaining was made, and therefore, the Valley Broadcasting Company decision is not applicable.

Dated Washington, D. C., July 11, 1951.

By direction of the Board:

/s/ LOUIS R. BECKER,

Acting Executive Secretary.

¹28 LRRM 2148, decided June 1, 1951.

Before the National Labor Relations Board
Twentieth Region

Case No. 20-CA-378

In the Matter of:

W. T. GRANT COMPANY

and

RETAIL CLERKS UNION, LOCAL 428, A.F.L.

Monday, November 13, 1950

Pursuant to notice the above-entitled matter came on for hearing at 10:00 o'clock a.m.

Before: William E. Spencer, Esq.,
Associate Chief Trial Examiner.

Appearances:

EUGENE K. KENNEDY, ESQ.,

San Francisco,

Appearing on Behalf of the General
Counsel.

FRANCIS J. McTERNAN, ESQ.,

57 Post Street, San Francisco, California,

Appearing on Behalf of Charging
Party, Retail Clerks Union, Local
428, AFL.

EUGENE M. FOLEY, ESQ.,

1441 Broadway, New York, New York,

Appearing on Behalf of Respondent.

JAMES P. McLOUGHLIN, and

VICTOR LAZZARO,

84 S. First Street, San Jose, California,

Appearing for Local 428, AFL.

PROCEEDINGS

* * *

Mr. Kennedy: Mr. Examiner, at this time I should like to have marked for identification as General Counsel's Exhibit 1, the original Charge filed on May 2, 1950; General Counsel's 2 for identification, the Affidavit——

Trial Examiner Spencer: What was the date of the filing of the charge?

Mr. Kennedy: May 2, 1950. As General Counsel's 2 for identification, the original Affidavit of Service of a copy of the original Charge with a return receipt attached; as General Counsel's 3 for identification, an Affidavit of——rather, a copy of the First Amended Charge; as General Counsel's 4 for identification, an Affidavit of Service of a copy of the First Amended Charge; as General Counsel's 5 for identification, the [5*] original First Amended Charge filed August 9, 1950; as General Counsel's Exhibit 6 for identification, the original Complaint issued on the 31st of August, 1950; as General Counsel's 7 for identification, the original Notice of Hearing, issued on the 31st of August, 1950; as General Counsel's 8 for identification, the original Affidavit of Service of Notice of Hearing, Complaint and First Amended Charge, with return receipts attached; as General Counsel's 9 for identification, the original Answer, dated September 6, 1950; as General Counsel's 10 for identification, the original Affidavit of Service of the Notice of Change

* Page numbering appearing at top of page of original Reporter's Transcript.

of Place of Hearing, with return receipt cards attached; as General Counsel's 11 for identification, the original Notice of Change of Place of [6] Hearing.

* * *

Mr. Kennedy: The next document in order will be General Counsel's 12 for identification, which will be the original Motion for a Bill of Particulars, dated October 3, 1950; as General Counsel's 13 for identification, the Order on the Motion; as General Counsel's 14 for identification, the Response pursuant to the Order for the Bill of Particulars.

At this time, Mr. Examiner, I should like to offer in evidence General Counsel's Exhibits 1 through 14 for identification. [7]

* * *

Trial Examiner Spencer: Any further objection than the one that has been registered?

The exhibits will be received as offered. [10]

* * *

Mr. Kennedy: I should first like to move to amend paragraph two of the Complaint so that subsection B will read, in addition to the contents already in subsection B, will include the following: "during the fiscal year ending January 31, 1950, the net income of the Respondents was"——

Trial Examiner Spencer: Will you restate that, please?

Mr. Kennedy: "During the fiscal year ending"——

Trial Examiner Spencer: "January 31, 1950," is the way I understood it.

Mr. Kennedy: Yes.

Trial Examiner Spencer: Very well.

Mr. Kennedy: ——"the net income of the Respondent was approximately nine million dollars and the Respondent operates approximately 400 retail stores in most of the States of the United States of America." [12]

* * *

Trial Examiner Spencer: Well, is there any objection to this amendment of the Complaint?

Mr. Foley: I think it is immaterial, Mr. Examiner, for the reason that we have conceded we are subject to the Act, many times conceded we are subject to the Act. I have no knowledge as to the net income for the Grant Company.

Mr. Kennedy: Well, I will make available the source of my knowledge.

Mr. Foley: I suggest, Mr. Kennedy, that that doesn't answer the question, whether the amendment is material. I think we have made a concession here that we are subject to the Act, and I submit that that ought to suffice.

Trial Examiner Spencer: Well, of course, you don't confer jurisdiction by admitting it. The Board still has to have the basic facts.

Mr. Foley: Yes; well, I suggest that the General Counsel has commerce information which shows that this store does business in excess of 100,000 dollars, more than 90 per cent of which is imported from without the State of California.

Mr. Kennedy: Yes, and that is already alleged in the Complaint, Mr. Foley.

Mr. Foley: And that is admitted.

Mr. Kennedy: Yes. [13]

Mr. Foley: And I think that we have sufficient, despite any concession.

Trial Examiner Spencer: Now, you admit the commerce allegations as they now stand, unamended?

Mr. Foley: Yes, sir.

Trial Examiner Spencer: Well, I suppose that it might be of some interest to the Board as to the approximate number of stores and their distribution; could you stipulate to that?

Mr. Foley: Yes, I can stipulate that the W. T. Grant Company operates approximately 495 retail stores which are located in 39 of the United States.

Trial Examiner Spencer: And that this is one of those stores?

Mr. Foley: This is one of the 495.

Trial Examiner Spencer: Will you accept that stipulation, Mr. Kennedy?

Mr. Kennedy: Yes.

Trial Examiner Spencer: Does the Union accept that?

Mr. McTernan: Yes.

Trial Examiner Spencer: Very well, that much is stipulated. Now that leaves only the figure of nine million dollars as the approximate net income.

Mr. Kennedy: Now, I suggest that Mr. Foley might consider stipulating the San Jose store is

average or below or less than average, whatever the fact is with respect to this dollar [14] operation.

Mr. Foley: I just don't understand that, the dollar—of business that it does, or profit, or what?

Trial Examiner Spencer: The way you have stated this in the proposed amendment is “net income”?

Mr. Kennedy: That is correct.

Mr. Foley: I suggest, Mr. Examiner, if we had a nine million dollar loss we still would be subject to the Act.

Mr. Kennedy: Well, I believe that with the number of stores indicated in the record, that the General Counsel is satisfied.

Trial Examiner Spencer: Very well. It seems to me, I would say, that the matter of jurisdiction is well covered by the matter that is now admitted and stipulated.

You don't press your motion, then, to further amend the Complaint?

Mr. Kennedy: I withdraw the part that hasn't been satisfied.

I would also like to move to amend the Complaint at this time with respect to paragraph seven, by adding a subdivision thereof to be entitled “(6)” and to read as follows: “Notified the employees of the Respondent San Jose store and the Union that the Respondent would never bargain about or agree to any Union security for the employees of the Respondent's San Jose store.” [15]

* * *

Mr. Kennedy: I will state all the facts with

respect to dates and persons that are presently available to us. This notification was made by two individuals, namely, Mr. Foley, presently [16A] counsel for the Respondent, and by Mr. Kihs, the Store Manager.

Trial Examiner Spencer: Spell that, please.

Mr. Kennedy: K-i-h-s. The date that this notification commenced was on or about January 25, 1950, and persists up to the present time, according to my best information.

Trial Examiner Spencer: Now, with that amplification I grant the motion to amend the [17] Complaint.

* * *

Mr. Kennedy: I would like to have the following marked for identification as General Counsel's Exhibits, as General Counsel's Exhibit No. 15, an authorization card dated January 4, 1940, signed—purportedly signed—by Maxine Rakestraw—

Trial Examiner Spencer: 1940?

Mr. Kennedy: 1950; January 4, 1950. As No. 16, an authorization signed January 6, 1950, by Omera Guillory; No. 17, an authorization dated January 6, 1950, signed by Betty Jean Beardsley; as No. 18, an authorization dated January 6, 1950, signed by Martha Nix; as No. 19; I'll state that these exhibits through 35 are all authorizations, and I will merely indicate the date and name: as 19, Adeline Loewen, January 4, 1950; [18]

* * *

Mr. Kennedy: I am not offering any of them yet, just having them marked and identified.

General Counsel's 36 for identification, copy of a letter dated January 5, 1950, addressed to F. J. Kihs, Manager, Grant Company, San Jose, from James P. McLoughlin, Secretary-Treasurer of the Retail Clerks Union, Local 428; [19]

* * *

JAMES P. McLOUGHLIN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kennedy:

Q. Will you state your name, please?

A. James P. McLoughlin.

* * *

Q. What is your occupation?

A. I am the Secretary-Treasurer of the Retail Clerks Union, Local 428, A.F.L.

Q. And how long have you held that position?

A. I have been the Secretary of the Union since 1942; I was originally elected as Business Representative in December of 1937. [21]

* * *

Mr. Kennedy: Well, Mr. Examiner, inasmuch as the foundational requisites with respect to General Counsel's Exhibits for identification-36 through 50 have been met by a courtesy of Mr. Foley, a stipulation of Mr. Foley, at this time I should like to offer in evidence General Counsel's Exhibits 36 through 50 for identification. [25]

* * *

(Testimony of James P. McLoughlin.)

Trial Examiner Spencer: Very well, I think we probably understand each other, and the exhibits are received without objection, as offered. [26]

* * *

GENERAL COUNSEL'S EXHIBIT No. 36

Retail Clerks Union, A. F. L.

Local No. 428

Of Santa Clara County and Menlo Park
347-350 Security Building, 84 South First Street
San Jose 16, California

Telephone: CYPRESS 3-2020

(Copy)

January 5, 1950.

Reg. Ret. Rec. Req.

Mr. F. J. Kihs, Manager,
W. T. Grant Company,
146 South First Street,
San Jose, California.

Dear Sir:

This is to officially advise you that the Retail Clerks Union, Local 428, has been designated as the collective bargaining representative of the majority of the employees of your store. As such, this Union is the legally authorized agent of your employees with whom all matters of wages, hours and working conditions must be negotiated.

Accordingly, it is our desire to meet with you at your earliest convenience for the purpose of negotiating a collective bargaining agreement covering the employees whom we represent in your store.

(Testimony of James P. McLoughlin.)

An acknowledgment of this communication is hereby requested, together with an indication from you as to when the collective bargaining negotiations can commence.

Very truly yours,

RETAIL CLERKS UNION,
LOCAL 428, AFL,

/s/ JAMES P. McLOUGHLIN,
Secretary-Treasurer.

Received in evidence Nov. 13, 1950.

GENERAL COUNSEL'S EXHIBIT No. 37

W. T. Grant Company
1441 Broadway, New York 18, N. Y.

January 9, 1950.

Retail Clerks Union, A. F. of L.,
347 Security Building,
84 South First Street,
San Jose 16, California.

Attention: Mr. James P. McLoughlin,
Secretary-Treasurer

Gentlemen:

Your letter addressed to Mr. Kihs has been referred to this office.

I have been called to Florida on business and have made arrangements to leave here on Friday, the

(Testimony of James P. McLoughlin.)

13th. I expect to return on the 20th, whereupon I will send you a telegram suggesting a date for a meeting.

Very truly yours,

W. T. GRANT COMPANY,

/s/ E. M. FOLEY.

EMF/ad

Received in evidence Nov. 13, 1950.

GENERAL COUNSEL'S EXHIBIT No. 38

[Western Union Telegram]

1950 Jan 20 PM 2 55

.OA386 SSB323

O.VJA073 DL PD—SI New York NY 20 432P

James P. McLoughlin Retail Clerks Union
84 South First St San Jose Calif (MSRTE)

Am Up to My Neck With Work but Will Meet
You Some Day Next Week if Your Schedule Per-
mits. Please Advise.

EUGENE M FOLEY.

Received in evidence Nov. 13, 1950.

(Testimony of James P. McLoughlin.)

GENERAL COUNSEL'S EXHIBIT No. 43

Twentieth Region

821 Market Street

San Francisco 3, California

February 1, 1950.

Air Mail.

Mr. Eugene M. Foley,
W. T. Grant Company,
1441 Broadway,
New York 18, New York.

Re: W. T. Grant Company
Case No. 20-RC-780

Dear Mr. Foley:

Enclosed you will find the original and one copy of a Consent Election Agreement form such as I discussed with you this morning by telephone. The form has been completely filled out simply to demonstrate our usual practice in these cases. If ultimately your Company determines that the proper way to resolve the question of representation raised by the Retail Clerks' petition is to proceed to a consent election, you may either sign the original of the Consent Election Agreement form enclosed and return it to us or prepare one like it by using different dates. Several blank forms have been enclosed for your convenience.

If the latter plan is adopted, we would ask you to allow approximately two weeks between the eligibility period and the date of the election. The

(Testimony of James P. McLoughlin.)

eligibility period is always the last day of a work week, which we understand in the San Jose store is Thursday. Any alterations that the Company might wish to make in Item 12 to conform that section to the facts will be quite satisfactory.

To save time we have also included two interstate commerce data forms, one of which you may return to us with a classified pay roll for a recent pay roll period. You understand this is necessary in order that we may check the showing submitted by the Retail Clerks with their petition.

In the event the Company determines to proceed to a formal hearing, will you please inform us of that decision as soon as possible and indicate to us the issues to be resolved at the hearing?

Thank you for your courtesy this morning and your cooperation in this matter.

Very truly yours,

JOHN H. IMMEL, JR.,

Field Examiner.

Enclosures

Received in evidence Nov. 13, 1950.

(Testimony of James P. McLoughlin.)

GENERAL COUNSEL'S EXHIBIT No. 44

W. T. Grant Company

1441 Broadway, New York 18, N. Y.

February 10, 1950.

Mr. Gerald A. Brown,
Regional Director,
National Labor Relations Board,
821 Market Street,
San Francisco 3, California.
Attention: Mr. John H. Immel, Jr.

Re: Case No. 20-RC-780

Gentlemen:

Unfortunately your letter of the 31st ult. reached me just as I was leaving for Tampa where an election was held in Case No. 10-RC-838. I have just returned and have had our Executive Vice-President sign the form you sent us. Obviously it is not intended for a retail store, but anyway we conceded, in answering question 15, that our Company is subject to the National Labor Relations Act.

Mr. Kihs, our store Manager, hasn't yet sent me a list of the employees, but I will phone him later today and request that he furnish the list so that you will be able to check the union cards.

Very truly yours,

W. T. GRANT COMPANY,

/s/ E. M. FOLEY.

EMF/ad

enc.

Received in evidence Nov. 13, 1950.

(Testimony of James P. McLoughlin.)

GENERAL COUNSEL'S EXHIBIT No. 47

821 Market Street
San Francisco 3, California

February 16, 1950.

Mr. Eugene M. Foley,
W. T. Grant Company,
1441 Broadway,
New York 18, New York.

Re: W. T. Grant Company
Case No. 20-RC-780

Dear Sir:

We advised you by wire today that the hearing in the above-entitled case will be postponed to March 3, 1950.

The matter was originally set on relatively short notice inasmuch as we anticipated that a local representative would appear for the Company. It was also our thought that since the case appears to present no fundamental issues which need be resolved by the Board, it might be possible to obtain a Consent Election Agreement. Mr. Immel has already written you enclosing copies of a proposed Consent Election Agreement in his letter of February 1, 1950. Although one letter has been received from you since that time, we as yet have no definite indication from you as to why such procedure should be unacceptable.

An examination of the file would indicate that there is only one union involved, that the Company

(Testimony of James P. McLoughlin.)

has declined to grant it recognition until certified by this agency, that the Company concedes the Board's jurisdiction, and that there is apparently no disagreement with respect to the appropriate unit. Under the circumstances it would seem that a Consent Election Agreement would be an appropriate method for resolving the issues raised by the petition. We urge that you give this serious consideration and advise us by return airmail whether or not the agreement we submitted is acceptable or, in the event it is not, forward us any suggestions you might have. We feel confident that you, as the labor relations representative of a large organization, will agree that expeditious resolution of matters such as this is desirable.

We hope to hear from you at an early date and trust that you will find it possible to enter into an arrangement which will avoid any further delay and inconvenience to any of us.

Very truly yours,

GERALD A. BROWN,
Regional Director.

Received in evidence Nov. 13, 1950.

(Testimony of James P. McLoughlin.)

GENERAL COUNSEL'S EXHIBIT No. 50

W. T. Grant Company
1441 Broadway, New York 18, N. Y.

February 20, 1950.

Air Mail.

Gerald A. Brown, Esq.,
Regional Director,
National Labor Relations Board,
821 Market Street,
San Francisco 3, California.

Re: Case No. 20-RC-780

Dear Sir:

I have your letter of the 16th inst.

I note that the hearing is to be held on March 3, 1950, at 10:00 a.m., in Room 634, Pacific Building, 821 Market Street, San Francisco. I will be present at that time; for the agreement which Mr. Immel forwarded to us is not acceptable. You may be sure, however, that I will do everything not inconsistent with our Company policy that will tend to avoid delay and inconvenience.

Very truly yours,

W. T. GRANT COMPANY,
/s/ E. M. FOLEY.

EMF/ad

Received in evidence Nov. 13, 1950.

(Testimony of James P. McLoughlin.)

Mr. Kennedy: I will now offer General Counsel's Exhibits 15 through 35 for identification in evidence. [27]

* * *

Trial Examiner Spencer: The cards are received as offered. [28]

* * *

GENERAL COUNSEL'S EXHIBIT No. 15

I Hereby Authorize the Retail Clerks Association, Local 428, affiliated with the R.C.I.P.A. and the A. F. of L., to represent me and, in my behalf, to negotiate all agreements as to Hours of Labor, Wages, and other Employment Conditions.

Name: Maxine Rakestraw.

Street or Box No.: 30 S. 10th.

City: San Jose.

Employed by: W. T. Grant Co.

City: San Jose.

/s/ MAXINE RAKESTRAW.

(Date of Signing): Jan. 4, 1950.

Retail Clerks Association, Local 428
Santa Clara County and Menlo Park
84 South First Street
San Jose 16, Calif.

Received in evidence Nov. 13, 1950.

(Testimony of James P. McLoughlin.)

GENERAL COUNSEL'S EXHIBIT No. 16

I Hereby Authorize the Retail Clerks Association, Local 428, affiliated with the R.C.I.P.A. and the A. F. of L., to represent me and, in my behalf, to negotiate all agreements as to Hours of Labor, Wages, and other Employment Conditions.

Name: Omera Guillory.

Street or Box No.: 139 N. 6th.

City: San Jose.

Employed by: W. T. Grant Co.

City: San Jose.

/s/ OMERA GUILLORY.

(Date of Signing): Jan. 6, 1950.

Retail Clerks Association, Local 428
Santa Clara County and Menlo Park
84 South First Street
San Jose 16, Calif.

Received in evidence Nov. 13, 1950.

(Testimony of James P. McLoughlin.)

GENERAL COUNSEL'S EXHIBIT No. 17

I Hereby Authorize the Retail Clerks Association, Local 428, affiliated with the R.C.I.P.A. and the A. F. of L., to represent me and, in my behalf, to negotiate all agreements as to Hours of Labor, Wages, and other Employment Conditions.

Name: Betty Jean Beardsley (Miss).

Street or Box No.: Rt. 3 Box 726.

City: Los Gatos.

Employed by: W. T. Grant Co.

City: San Jose.

/s/ BETTY JEAN BEARDSLEY.

(Date of Signing): January 6, 1950.

Retail Clerks Association, Local 428
Santa Clara County and Menlo Park
84 South First Street
San Jose 16, Calif.

Received in evidence Nov. 13, 1950.

(Testimony of James P. McLoughlin.)

GENERAL COUNSEL'S EXHIBIT No. 18

I Hereby Authorize the Retail Clerks Association, Local 428, affiliated with the R.C.I.P.A. and the A. F. of L., to represent me and, in my behalf, to negotiate all agreements as to Hours of Labor, Wages, and other Employment Conditions.

Name: Martha Nix.

Street or Box No.: Rt. 6 Box 350.

City: San Jose.

Employed by: W. T. Grant Co.

City: San Jose.

/s/ MARTHA NIX.

(Date of Signing): Jan. 6, 1950.

Retail Clerks Association, Local 428
Santa Clara County and Menlo Park
84 South First Street
San Jose 16, Calif.

Received in evidence Nov. 13, 1950.

(Testimony of James P. McLoughlin.)

GENERAL COUNSEL'S EXHIBIT No. 19

I Hereby Authorize the Retail Clerks Association, Local 428, affiliated with the R.C.I.P.A. and the A. F. of L., to represent me and, in my behalf, to negotiate all agreements as to Hours of Labor, Wages, and other Employment Conditions.

Name: Adeline Loewen.

Street or Box No.: 505 Page.

City: San Jose.

Employed by: W. T. Grant Co.

City: San Jose.

/s/ ADELINE LOEWEN.

(Date of Signing): January 4, 1950.

Retail Clerks Association, Local 428
Santa Clara County and Menlo Park
84 South First Street
San Jose 16, Calif.

Received in evidence Nov. 13, 1950.

(Testimony of James P. McLoughlin.)

GENERAL COUNSEL'S EXHIBIT No. 20

I Hereby Authorize the Retail Clerks Association, Local 428, affiliated with the R.C.I.P.A. and the A. F. of L., to represent me and, in my behalf, to negotiate all agreements as to Hours of Labor, Wages, and other Employment Conditions.

Name: Evelyn M. De Janvier.

Street or Box No.: Rt 3 Box 818.

City: Los Gatos.

Employed by: W. T. Grant Co.

City: San Jose.

/s/ EVELYN M. De JANVIER.

(Date of Signing): January 4, 1950.

Retail Clerks Association, Local 428
Santa Clara County and Menlo Park
84 South First Street
San Jose 16, Calif.

Received in evidence Nov. 13, 1950.

(Testimony of James P. McLoughlin.)

GENERAL COUNSEL'S EXHIBIT No. 21

I Hereby Authorize the Retail Clerks Association, Local 428, affiliated with the R.C.I.P.A. and the A. F. of L., to represent me and, in my behalf, to negotiate all agreements as to Hours of Labor, Wages, and other Employment Conditions.

Name: Nellie Marie Putney.

Street or Box No.: 4 Selo Drive.

City: Sunnyvale.

Employed by: W. T. Grant Co.

City: San Jose.

/s/ NELLIE MARIE PUTNEY.

(Date of Signing): January 4, 1950.

Retail Clerks Association, Local 428
Santa Clara County and Menlo Park
84 South First Street
San Jose 16, Calif.

Received in evidence Nov. 13, 1950.

(Testimony of James P. McLoughlin.)

GENERAL COUNSEL'S EXHIBIT No. 22

I Hereby Authorize the Retail Clerks Association, Local 428, affiliated with the R.C.I.P.A. and the A. F. of L., to represent me and, in my behalf, to negotiate all agreements as to Hours of Labor, Wages, and other Employment Conditions.

Name: Florence Bernal.

Street or Box No.: 1752 Gauadalupe.

City: San Jose.

Employed by: W. T. Grant Co.

City: San Jose.

/s/ FLORENCE BERNAL.

(Date of Signing): Jan. 5, 1950.

Retail Clerks Association, Local 428
Santa Clara County and Menlo Park
84 South First Street
San Jose 16, Calif.

Received in evidence Nov. 13, 1950.

(Testimony of James P. McLoughlin.)

GENERAL COUNSEL'S EXHIBIT No. 23

I Hereby Authorize the Retail Clerks Association, Local 428, affiliated with the R.C.I.P.A. and the A. F. of L., to represent me and, in my behalf, to negotiate all agreements as to Hours of Labor, Wages, and other Employment Conditions.

Name: Faye Jackson.

Street or Box No.: 373 Stockton.

City: San Jose.

Employed by: W. T. Grant Co.

City: San Jose.

/s/ FAYE JACKSON.

(Date of Signing): Jan. 4, 1950.

Retail Clerks Association, Local 428
Santa Clara County and Menlo Park
84 South First Street
San Jose 16, Calif.

Received in evidence Nov. 13, 1950.

(Testimony of James P. McLoughlin.)

GENERAL COUNSEL'S EXHIBIT No. 24

I Hereby Authorize the Retail Clerks Association, Local 428, affiliated with the R.C.I.P.A. and the A. F. of L., to represent me and, in my behalf, to negotiate all agreements as to Hours of Labor, Wages, and other Employment Conditions.

Name: Rose M. Pasut.

Street or Box No.: 447 N. 1st.

City: San Jose.

Employed by: W. T. Grant Co.

City: San Jose.

/s/ ROSE PASUT.

(Date of Signing): Jan. 4, 1950.

Retail Clerks Association, Local 428
Santa Clara County and Menlo Park
84 South First Street
San Jose 16, Calif.

Received in evidence Nov. 13, 1950.

(Testimony of James P. McLoughlin.)

GENERAL COUNSEL'S EXHIBIT No. 25

I Hereby Authorize the Retail Clerks Association, Local 428, affiliated with the R.C.I.P.A. and the A. F. of L., to represent me and, in my behalf, to negotiate all agreements as to Hours of Labor, Wages, and other Employment Conditions.

Name: Ione Williams.

Street or Box No.: 75 Lester.

City: San Jose.

Employed by: W. T. Grant Co.

City: San Jose.

/s/ IONE WILLIAMS.

(Date of Signing): Jan. 5, 1949.

Retail Clerks Association, Local 428
Santa Clara County and Menlo Park
84 South First Street
San Jose 16, Calif.

Received in evidence Nov. 13, 1950.

(Testimony of James P. McLoughlin.)

GENERAL COUNSEL'S EXHIBIT No. 26

I Hereby Authorize the Retail Clerks Association, Local 428, affiliated with the R.C.I.P.A. and the A. F. of L., to represent me and, in my behalf, to negotiate all agreements as to Hours of Labor, Wages, and other Employment Conditions.

Name: Robert E. Ellington.

Street or Box No.: 325 N. 20th.

City: San Jose.

Employed by: W. T. Grant Co.

City: San Jose.

/s/ ROBERT E. ELLINGTON.

(Date of Signing): Jan. 4, 1950.

Retail Clerks Association, Local 428
Santa Clara County and Menlo Park
84 South First Street
San Jose 16, Calif.

Received in evidence Nov. 13, 1950.

(Testimony of James P. McLoughlin.)

GENERAL COUNSEL'S EXHIBIT No. 27

I Hereby Authorize the Retail Clerks Association, Local 428, affiliated with the R.C.I.P.A. and the A. F. of L., to represent me and, in my behalf, to negotiate all agreements as to Hours of Labor, Wages, and other Employment Conditions.

Name: Betty Devoni.

Street or Box No.: 1279 Palm St.

City: San Jose.

Employed by: W. T. Grant Co.

City: San Jose.

/s/ BETTY DEVONI.

(Date of Signing): Jan. 4, 1950.

Retail Clerks Association, Local 428
Santa Clara County and Menlo Park
84 South First Street
San Jose 16, Calif.

Received in evidence Nov. 13, 1950.

(Testimony of James P. McLoughlin.)

GENERAL COUNSEL'S EXHIBIT No. 28

I Hereby Authorize the Retail Clerks Association, Local 428, affiliated with the R.C.I.P.A. and the A. F. of L., to represent me and, in my behalf, to negotiate all agreements as to Hours of Labor, Wages, and other Employment Conditions.

Name: Melissa Cook.

Street or Box No.: 2333 Cottle.

City: San Jose.

Employed by: W. T. Grant Co.

City: San Jose.

/s/ MELISSA COOK.

(Date of Signing): Dec. 5, 1950.

Retail Clerks Association, Local 428
Santa Clara County and Menlo Park
84 South First Street
San Jose 16, Calif.

Received in evidence Nov. 13, 1950.

(Testimony of James P. McLoughlin.)

GENERAL COUNSEL'S EXHIBIT No. 29

I Hereby Authorize the Retail Clerks Association, Local 428, affiliated with the R.C.I.P.A. and the A. F. of L., to represent me and, in my behalf, to negotiate all agreements as to Hours of Labor, Wages, and other Employment Conditions.

Name: Pearl Nicholson.

Street or Box No.: 64 Stratford Dr.

City: Los Gatos.

Employed by: W. T. Grant Co.

City: San Jose.

MRS. PEARL NICHOLSON.

(Date of Signing) : Jan. 5, 1950.

Retail Clerks Association, Local 428
Santa Clara County and Menlo Park
84 South First Street
San Jose 16, Calif.

Received in evidence Nov. 13, 1950.

(Testimony of James P. McLoughlin.)

GENERAL COUNSEL'S EXHIBIT No. 30

I Hereby Authorize the Retail Clerks Association, Local 428, affiliated with the R.C.I.P.A. and the A. F. of L., to represent me and, in my behalf, to negotiate all agreements as to Hours of Labor, Wages, and other Employment Conditions.

Name: Tony Intravia.

Street or Box No.: 919 Palm.

City: San Jose.

Employed by: W. T. Grant Co.

City: San Jose.

/s/ TONY J. INTRAVIA.

(Date of Signing): Jan. 5, 1950.

Retail Clerks Association, Local 428
Santa Clara County and Menlo Park
84 South First Street
San Jose 16, Calif.

Received in evidence Nov. 13, 1950.

(Testimony of James P. McLoughlin.)

GENERAL COUNSEL'S EXHIBIT No. 31

I Hereby Authorize the Retail Clerks Association, Local 428, affiliated with the R.C.I.P.A. and the A. F. of L., to represent me and, in my behalf, to negotiate all agreements as to Hours of Labor, Wages, and other Employment Conditions.

Name: Marie Joldersma.

Street or Box No.: 444 So. 5th.

City: San Jose.

Employed by: W. T. Grant Co.

City: San Jose.

MARIE JOLDERSMA.

(Date of Signing): Jan. 5, 1950.

Retail Clerks Association, Local 428
Santa Clara County and Menlo Park
84 South First Street
San Jose 16, Calif.

Received in evidence Nov. 13, 1950.

(Testimony of James P. McLoughlin.)

GENERAL COUNSEL'S EXHIBIT No. 32

I Hereby Authorize the Retail Clerks Association, Local 428, affiliated with the R.C.I.P.A. and the A. F. of L., to represent me and, in my behalf, to negotiate all agreements as to Hours of Labor, Wages, and other Employment Conditions.

Name: Faye Awood.

Street or Box No.: 1030 E. Santa Clara.

City: San Jose.

Employed by: W. T. Grant Co.

City: San Jose.

/s/ FAYE AWOOD.

(Date of Signing): Jan. 5, 1950.

Retail Clerks Association, Local 428
Santa Clara County and Menlo Park
84 South First Street
San Jose 16, Calif.

Received in evidence Nov. 13, 1950.

(Testimony of James P. McLoughlin.)

GENERAL COUNSEL'S EXHIBIT No. 33

I Hereby Authorize the Retail Clerks Association, Local 428, affiliated with the R.C.I.P.A. and the A. F. of L., to represent me and, in my behalf, to negotiate all agreements as to Hours of Labor, Wages, and other Employment Conditions.

Name: Angel G. Sanchez.

Street or Box No.: 1001 Spencer.

City: San Jose.

Employed by: W. T. Grant Co.

City: San Jose.

/s/ ANGEL G. SANCHEZ.

(Date of Signing): Jan. 4, 1950.

Retail Clerks Association, Local 428
Santa Clara County and Menlo Park
84 South First Street
San Jose 16, Calif.

Received in evidence Nov. 13, 1950.

(Testimony of James P. McLoughlin.)

GENERAL COUNSEL'S EXHIBIT No. 34

I Hereby Authorize the Retail Clerks Association, Local 428, affiliated with the R.C.I.P.A. and the A. F. of L., to represent me and, in my behalf, to negotiate all agreements as to Hours of Labor, Wages, and other Employment Conditions.

Name: Rosamond McAllister.

Street or Box No.: 268 Airport Village.

City: San Jose.

Employed by: W. T. Grant Co.

City: San Jose.

/s/ ROSAMOND McALLISTER.

(Date of Signing): Jan. 5, 1950.

Retail Clerks Association, Local 428
Santa Clara County and Menlo Park
84 South First Street
San Jose 16, Calif.

Received in evidence Nov. 13, 1950.

(Testimony of James P. McLoughlin.)

GENERAL COUNSEL'S EXHIBIT No. 35

I Hereby Authorize the Retail Clerks Association, Local 428, affiliated with the R.C.I.P.A. and the A. F. of L., to represent me and, in my behalf, to negotiate all agreements as to Hours of Labor, Wages, and other Employment Conditions.

Name: Wanda Wood.

Street or Box No.: 137 Colton Pl.

City: San Jose.

Employed by: W. T. Grant Co.

City: San Jose.

/s/ WANDA WOOD.

(Date of Signing) : Jan. 4, 1950.

Retail Clerks Association, Local 428
Santa Clara County and Menlo Park
84 South First Street
San Jose 16, Calif.

Received in evidence Nov. 13, 1950.

Q. (By Mr. Kennedy) : Now, Mr. McLoughlin, can you recall having a meeting in San Jose in the early part of this year with Mr. Foley and Mr. Kihs? A. I did, yes.

Q. And was there anyone else present?

A. Vic Lazzaro, the Business Representative of the Union; Mr. Foley, Mr. Kihs, and myself.

(Testimony of James P. McLoughlin.)

Q. Can you place the date of that meeting?

A. It was sometime in the latter part of January or the first part of February, in the Santa Clara Hotel.

Q. And approximately how long did that meeting last?

A. Anywhere from two to two and a half hours, and it was in the afternoon, as I recall.

Q. Now, what was the purpose of this meeting, Mr. McLoughlin?

A. The purpose of the meeting was in response to our letter, first of all notifying the company that we were representing the [29] people and asked to be recognized; several communications were sent back and forth. Mr. Foley arrived in town this particular day, and the purpose of the meeting was to discuss the method of satisfying the company as to the fact that we did represent the employees in the Grant store.

Q. Now, were both you and Mr. Lazzaro acting as spokesmen for the union at this conference?

A. We were, yes.

Q. Can you recall what you advised the representatives of the Grant company with respect to what the Union's proposal or solution was, to settle this representation problem?

A. The proposal that we made to the company was that first of all they recognize us with a cross-check or any other quick procedure; the question of election was brought up by Mr. Foley, he felt that a National Labor Relations Board election

(Testimony of James P. McLoughlin.)

would be necessary; he pointed out that he felt they were in commerce, the number of stores they had, and so forth. We discussed that for some time. We proposed a State Conciliation Service election which is handled by the State of California, can be handled in a couple of days, and we pointed out the Board procedure was a little bit long, that we didn't feel it was necessary because we represented the people and we felt that any needless delays should be dispensed with.

Q. Now, during this meeting would you say that Mr. Foley was the main spokesman for the Grant Company? [30]

A. Yes, Mr. Foley was.

Q. And do you recall what Mr. Foley's response was to your general proposal as you have just outlined it?

A. Well, Mr. Foley felt that the best thing to do was to get the rules of procedure; he has Mr. Kihs, the Store Manager, go back to the store and bring the company manual where we could read the national policy of W. T. Grant to ourselves, so that we would have a thorough knowledge as to who we were dealing with, and so forth.

Q. And did Mr. Kihs procure such a manual?

A. Yes, he did, and we then discussed the manual.

Q. Now, what portion of the manual were you referred to, if any, when Mr. Kihs produced it?

A. The one pertaining to the necessity of the National Labor Board election for representation purposes, as set forth in their manual, leaving them

(Testimony of James P. McLoughlin.)

no alternative, and they wanted to abide by it, as they explained to us. [31]

* * *

Q. All right; now, was there any agreement by either you or Mr. Lazzaro to process this representation matter through the National Labor Relations Board?

A. There was not, at the meeting. We felt that our proposal for a check-off or a conciliation service election would be [32] sufficient. However, Mr. Foley again insisted upon a National Labor Relations Board election, felt that it could be done very speedily if we would agree to it, that the consent petition could be sent to New York by air mail and within a matter of a couple of days all our delays could be over with and we shouldn't have any trouble. We told him, well, we would think about it and we would let him know, or we would go ahead and file for an election.

Trial Examiner Spencer: You would go ahead and file for an election?

The Witness: Yes, with the National Labor Relations Board.

Q. (By Mr. Kennedy): Do you recall at what stage of the meeting this statement of Mr. Foley was made about—that you have just described?

A. It was at the end of the meeting, and then as we were departing, in the lobby of the hotel, we again discussed it and again Mr. Foley felt that we could hurry up and get it over with and file for an election.

(Testimony of James P. McLoughlin.)

Q. Now, so that the record will be as clear as possible, will you state, Mr. McLoughlin, the words of Mr. Foley with respect to the NLRB petition, as close as possible, right now?

A. The final parting words, as I recall them, were that if we would file for a National Labor Relations Board election that the petition for consent agreement could be transmitted to New York by air mail, it wouldn't necessitate an additional meeting, that everything would be fine, and we could go ahead and have [33] the election within a week or two period without any difficulty.

* * *

Q. Now, subsequent to this meeting, Mr. McLoughlin, was there a petition filed by your union for the employees at the Grant store in San Jose?

A. Yes, we discussed it among ourselves and with some of the people at the store, realizing that there wasn't any other position [34] to take with this national concern other than to have an election of this kind, and we did file for an election with the National Labor Relations Board.

Q. Do you recall the date of that petition?

A. No, offhand, I do not.

Q. I now hand you a document purporting to be a copy of a representation petition and ask you if you will examine that and see if that refreshes your memory with respect to the date on which it was filed?

A. Yes, this is it, January 31.

Q. Now, subsequent to the filing of this petition,

(Testimony of James P. McLoughlin.)

was there a formal hearing held in this matter, Mr. McLoughlin? A. Yes, there was.

Q. Do you recall the date of that hearing?

A. No, I wasn't in the meeting, the formal meeting, this formal hearing; I wasn't there when that was held. It was in San Francisco, and Vic Lazaro represented our Union as well as the attorney.

Q. Subsequent to this hearing did the National Labor Relations Board direct a hearing in the Grant Store in San Jose?

A. Yes, they did. [35]

* * *

Q. (By Mr. Kennedy): Mr. McLoughlin, I hand you General Counsel's Exhibit 51 for identification and ask you whether or not this was the certificate of direction of election in the matter of the hearing in the San Jose Grant store which was directed on the date indicated thereon?

A. Yes, this is the notification.

Q. Can you also state whether or not the Grant Company involved in this representation proceeding is the same company that is presently involved in this unfair labor practice proceeding?

A. It is, yes.

Mr. Kennedy: I will offer in evidence General Counsel's Exhibit 51 for identification.

Trial Examiner Spencer: Objections?

Mr. Foley: No objections.

Trial Examiner Spencer: It will be received.

* * *

(Testimony of James P. McLoughlin.)

GENERAL COUNSEL'S EXHIBIT No. 51

Form NLRB-1415

United States of America
Before the National Labor Relations Board
Case No. 20-RC-780

In the Matter of:

W. T. GRANT COMPANY,

Employer,

and

RETAIL CLERKS UNION, LOCAL 428, Affiliated With RETAIL CLERKS INTERNATIONAL ASSOCIATION, A. F. OF L.,
Petitioner.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the National Labor Relations Act.

(Testimony of James P. McLoughlin.)

2. The labor organization(s) named below claim(s) to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act: All employees at its San Jose, California, retail store, excluding supervisors.¹

DIRECTION OF ELECTION

As part of the investigation to ascertain representatives for the purposes of collective bargaining with the Employer, an election by secret ballot shall be conducted as early as possible, but not later than 30 days from the date of this Direction, under the direction and supervision of the Regional Director for the Region in which this case was heard, and subject to Section 203.61 and 203.62 of the National Labor Relations Board's Rules and Regulations, among the employees in the unit found appropriate in paragraph numbered 4, above, who were employed during the pay-roll period immediately preceding the date of this Direction of Elec-

¹The parties agree and we find, that the store manager, assistant store manager, and floorman are supervisors within the meaning of the Act.

(Testimony of James P. McLoughlin.)

tion, including employees who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, but excluding those employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election, and also excluding employees on strike who are not entitled to reinstatement, to determine whether (or not) they desire to be represented, for purposes of collective bargaining, by Retail Clerks Union, Local 428, affiliated with Retail Clerks International Association, A. F. of L.

Signed at Washington, D. C., this 4th day of April, 1950.

PAUL M. HERZOG,

Chairman,

JOHN M. HOUSTON,

Member,

PAUL L. STYLES,

Member,

[Seal]

NATIONAL LABOR

RELATIONS BOARD.

Received in evidence Nov. 13, 1950.

Q. (By Mr. Kennedy): Now, subsequent to the receipt of that Board order and direction of election, Mr. McLoughlin, on behalf of the union did you take any further action with respect to [36] the direct election?

(Testimony of James P. McLoughlin.)

A. We, of course, were anxious to get the election as rapidly as we could, and to arrange for the dates, and so forth.

Q. Well, specifically, was this election ever held?

A. No, it was not. [37]

* * *

Q. (By Mr. Kennedy): Now, subsequent to your filing this representation petition, Mr. McLoughlin, were you notified that a consent election agreement proposal had been forwarded to Mr. Foley? A. Yes, I was notified.

Q. Do you remember how long after the petition was filed you were so notified?

A. I don't recall; it was, well, several days later when I was informed that a consent election wasn't satisfactory, which was a shock to me.

Trial Examiner Spencer: Strike "which was a shock to me."

* * *

Q. (By Mr. Kennedy): Mr. McLoughlin, is there, in the retail stores in this area, a commonly understood and expressed practice [41] and desire on the part of the employees in such stores relative to their preference to working a 40-hour 6-day week, or a 40-hour 5-day week?

A. All of our agreements——

Q. Excuse me; I think the answer called for is a relatively brief one, if you will bear in mind my question.

A. The retail people desire the 5-day week.

Q. And you say there is such a commonly un-

(Testimony of James P. McLoughlin.)

derstood practice and desire on the part of the people that you represent?

A. Yes, there is.

Q. And would you state what it is, please?

Mr. Foley: I think he has answered the question, hasn't he?

Mr. Kennedy: Well, he hasn't given you an opportunity to object.

The Witness: Our people desire and enjoy the 40-hour 5-day week. [42]

* * *

Cross-Examination

By Mr. Foley: [43]

* * *

Q. Did I tell you that I had just come back from negotiating a contract in Tampa?

A. You mentioned about being in Florida and one of your wires made reference to a trip in Florida, but I don't know anything——

Q. And did I tell you that I had agreed to a check-off of dues list?

A. No. You didn't mention that at all; I don't remember it.

Q. Now, you said you took steps after receipt of the direction of elections to accelerate the date of the election; will you tell us what steps you took?

A. To discuss the dates and so forth with the Board and to clear our own timing as far as the availability of our own dates were concerned.

(Testimony of James P. McLoughlin.)

Q. Well, the election, may I remind you, was directed for the 30th day after the decision. Did you have any hand in having it delayed until the 30th day?

A. I don't know what you have reference to.

Q. Well, the decision was dated April 4th and the election was to be held on the 3rd; that's a lapse of 29 or 30 days.

A. Well, that was the agreeable day.

Q. That was an agreeable date to the Union?

A. As well as to the employer, is what I understood.

Q. Well, you have no knowledge of the employer's even being [46] consulted about the date of the election, have you?

A. No, except it was going to be held on Thursday, or some time in there; that seemed to be an agreeable day, as far as the number of people being on the payroll is concerned.

Q. Well, as a matter of fact, May 3rd was on a Tuesday, wasn't it?

A. I'd have to look at a calendar.

Trial Examiner Spencer: Does the Board's decision on the election, which you have offered in evidence, bear a date, Mr. Kennedy?

Mr. Kennedy: It bears the date of the 4th of April, 1950.

Trial Examiner Spencer: Thank you. [47]

* * *

Q. There is an Employers Council in this community, isn't there, or this County?

(Testimony of James P. McLoughlin.)

A. Yes, there is.

Q. And you will have to lead me on this, I don't know: Is it constituted for the purpose of exchanging information between employers as to wage conditions, and the like?

A. I wouldn't know what their function is, no.

Q. Well, you know it is customary for merchants to try to keep their prices in line with other merchants, don't you? A. Yes.

Q. And their wage conditions in line?

A. Well, I don't know whether they do it [48] or not.

Q. Well, they try to, don't they—you know that.

A. Yes.

Q. The Kress store is in close proximity to the Grant store, isn't it? A. Yes, it is.

Q. You spoke of wage increases being given by the employer here, the Respondent; do you know whether any of these wage increases went beyond bringing the wages in Grant's up to the level of the wages in Kress?

Mr. McTernan: I may have an objection, Mr. Examiner, to this line of questioning, as incompetent, irrelevant, and immaterial, as far as I can see. It is directed, apparently toward the statements Mr. McLoughlin made on direct examination as to the reasons of his withdrawing of the petition, so that the cross-examination with reference to wages, Kress' or anywhere else, has nothing to do with that; secondly, wage scales in other stores have, as I can see, no connection at all with the

(Testimony of James P. McLoughlin.)

unilateral grant of a wage increase by this employer.

Trial Examiner Spencer: I am inclined to think that it's a waste of time to cross-examine this witness extensively on the reasons that he gave for withdrawing the petition; the only—some of that material came in over my feeling that it wasn't proper to put it in, and I am now going to strike all of the answers given by this witness to questions regarding his reasons for withdrawing from the election. I think that we will just spend a lot [49] of time here; it doesn't establish anything.

Mr. Foley: That's all. [50]

* * *

Trial Examiner Spencer: The hearing will be in order.

This meeting that you testified that you had with Mr. Foley and the Store Manager, which you testified occurred in the latter part of January or early February, 1950, I wonder if counsel could stipulate the date of that meeting?

Mr. Foley: January 25, 1950.

Mr. Kennedy: We will so stipulate.

Trial Examiner Spencer: Very well. [52]

* * *

Trial Examiner Spencer: If you will excuse me, Mr. Kennedy, there may still be a little confusion there.

Mr. McLoughlin, did you specifically at that meeting offer the company to settle the question of

(Testimony of James P. McLoughlin.)

majority by checking your cards against the payroll; did you make that specific offer?

The Witness: Yes.

Mr. Foley: To me?

The Witness: Yes.

Mr. Foley: What was my response?

The Witness: To the question of the procedure of the company—I recall you saying at one time, Mr. Foley, that you didn't like—that you weren't a coward, but you wanted us to read it for ourselves as to just what we had to do.

Mr. Foley: That's right. And as a matter of fact, everything that was said by the company was said in print, you read it in the manual.

The Witness: Well, I am not familiar with whether or not that loose-leaf there is the same one that you had in the hotel in January, but you did have a manual that appeared to be of that variety.

Mr. Foley: But you read it, and it said so in there.

The Witness: Right.

Mr. Foley: In other words, there wasn't any oral conversation [57] as to what the company would require, what the company's feelings were; it was in print.

The Witness: It was.

* * *

VICTOR J. LAZZARO

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kennedy:

Q. State your name, address and occupation for the record.

A. Victor J. Lazzaro, 27 Sunnyslope Avenue, San Jose; employed as a Business Representative for the Retail Clerks Union, Local 428, AFL. [58]

Q. I am going to ask if you will, please, speak just a little bit louder.

Directing your attention to the early part of 1950, will you state whether or not before January 25th you had any contact with Mr. Kihs, who is the Manager of the Grant store in San Jose?

A. Yes, I did.

Q. And will you state what that was, please?

A. I paid a visit to Mr. Kihs in the San Jose Grant store following the letter asking the company for recognition. The conversation was very simple; I merely stated to him that I represented the Retail Clerks Union, who had sent him this letter asking for recognition, that we feel that a majority of the people had designated us as their collective bargaining representative, and therefore we feel that we have a right to come into this store and speak

(Testimony of Victor J. Lazzaro.)

to people, the employees of the company, about the Union, call a meeting, and such. [59]

* * *

Q. (By Mr. Kennedy): All right, now, did you go into the store after this meeting of January 25?

A. Yes.

Q. Will you tell us what happened then?

A. I went into the store to ask the employees of the store to attend a meeting, not by verbal methods, but by handing them a post card, which asked the people to attend the meeting at a given time and place and date, and at that time representatives of the firm, variously, Mr. Burton, the Assistant Manager; Mr. Kihs, Manager; Mrs. Kleidon, Assistant, also, I believe, followed [60] me around the store as I tendered a card to the various employees to attend the meeting.

Q. Could you describe how closely you were followed?

A. I would say within a foot or two, as close as anyone could be to a person. [61]

* * *

Q. Now, with reference to the January 25 meeting, Mr. Lazzaro, would you state what took place there, particularly with respect to the statements made by the Union representatives and the representatives of the company concerning this question of representation?

A. I was in the discussion that took place in the room in the Hotel Sainte Claire on the 25th of January, at which time we did offer alternatives

(Testimony of Victor J. Lazzaro.)

to an NLRB election, and each of the alternatives was denied the Union by Mr. Foley, sometimes in direct language and other times by reference; and the time that I refer to by reference is when he asked the Store Manager to go to the store and obtain the store manual and bring same back so that we [62] might read its contents in the labor relations section of the manual—the company provides the Store Managers, as I understand it.

Q. Now, in short, it was the company's position that a certification by the National Labor Relations Board was required prior to recognition, is that correct? A. That's right.

Q. And at that meeting you and Mr. McLoughlin advanced the idea that alternative methods to determine a majority would be preferential from your standpoint, is that right? A. Yes, sir.

Q. Now, before the meeting closed, what was said by either you or Mr. McLoughlin with respect to filing a petition with the National Labor Relations Board, if anything?

A. All that was said seemed to point to a simplification of obtaining an election, and that though I may be far away, Mr. Foley indicated that we can get letters back and forth quickly by air mail or by wire.

Q. Excuse me, Mr. Lazzaro, I am going to ask you to listen to the question I am going to ask you, again, please: Do you recall whether anything was said by you or Mr. McLoughlin as to whether or not the Union would file a petition with the National

(Testimony of Victor J. Lazzaro.)

Labor Relations Board, and if anything at all was said on the subject, what was it, if you recall?

A. We were asked to file with the Board, and that the agreement [63] on the part of the company could be made hastily in answer to wires or letters, air mail.

* * *

Trial Examiner Spencer: Now, the question is, the question didn't go to your opinion; the question went to what you did at this meeting: Did you agree to file the petition, or didn't you?

The Witness: We agreed finally, yes. [64]

* * *

Q. (By Mr. Kennedy): Mr. Lazzaro, I show you General Counsel's 52 for identification and ask you to examine it and state whether or not you are the Victor J. Lazzaro listed in such as appearing for the Union involved? A. Yes.

Q. Have you had an occasion to examine that transcript and determine whether or not it is an accurate record of the proceedings at which you were in attendance as one of the parties?

A. Yes, I have had a look at it.

Mr. Kennedy: I will now offer in evidence General Counsel's Exhibit 52 for identification, a copy of the transcript of the case I have just mentioned.

Mr. Foley: No objection.

Trial Examiner Spencer: It is received, but I would like to know your purpose, Mr. Kennedy, so I will know what I am called on to do with reference to this exhibit.

(Testimony of Victor J. Lazzaro.)

Mr. Kennedy: Yes; the theory of the General Counsel with the course of conduct of the Respondent is exemplified by many of the exhibits which have been introduced, taken together with the incidents which we contend occurred at the store during the [66] interval between the original request for recognition and the present date, reflect a determination on the part of the Respondent to preclude the employees having a free and unfettered choice of their collective bargaining agent; and specifically with respect to this transcript, we contend that it will reflect that there were no issues which required the hearing, and was utilized by the Respondent as a device to gain time in defeating the ends of the employees.

Trial Examiner Spencer: In the R-case, in other words, there was no dispute as to unit, no dispute as to the employees covered?

Mr. Kennedy: That is correct.

Trial Examiner Spencer: In effect, it was a stipulated set of facts in the R-case?

Mr. Kennedy: In effect.

Mr. Foley: Would you hear me on that, Mr. Examiner?

Trial Examiner Spencer: Yes. I just don't want to proceed with the exhibits unless I know what I am supposed to do with them.

Mr. Foley: Now, in that case, the Respondent made known its position, and I stated before, the Respondent operates 495 stores throughout the United States, and whenever there has been a ques-

(Testimony of Victor J. Lazzaro.)

tion of a unit, the Respondent has uniformly taken the position that there is one unit and it consists of the entire store, whether the store has a luncheon department—which this store [67] has not, but some of them have—that the luncheonette employees should be included in the unit, and at all events office employees are to be included in the unit. There was some discussion between Mr. Lazzaro, Mr. McLoughlin, and myself on January 25—and since I am not testifying, I shall not say what the discussion was.

Mr. Kennedy: I have no objection, if you want to incorporate it in your argument.

Mr. Foley: But Mr. McLoughlin stated during the course of this discussion that “well, it’s been customary to give the office employees to the office workers union,” and we talked about that and I told him about our uniform practice of making one unit for the entire store, that we wanted to deal with one union and not several unions. I knew it was customary, as I said right here in the minutes, that our position has never been—and I am proud it has never been—we want the office workers in when the union wants them out, or we want them out when the union wants them in. We have taken one stand, and during the course of this thing a decision came down in the case of Mass Brothers, a department store in Tampa, Florida, where the employees were divided up into several unions and the Board took the position that: “Well, there are some unions here, and we will divide it, too.” In

(Testimony of Victor J. Lazzaro.)

the brief I filed with the Board in this representation case, I said that I don't think the unit is to vary, from time to time, depending on the wishes of the union, [68] and I wanted to create in Washington a record of uniformity.

There was a question of whether I could write to the Executive Secretary, I think, about extra time to file briefs, and I said, "No, I don't want any extra time."

As a matter of fact, before this proceeding is over I will submit application by the Petitioner here for extra time to file briefs beyond the time during which my brief was filed.

In fact, the application for the extra time was after my brief was filed. I will submit that later.

Trial Examiner Spencer: Well, in this representation proceeding there was agreement on the unit, is that correct?

Mr. Foley: In effect, excepting there was a clarification, during the course of the proceeding, a little misnomer here and there; we straightened it [69] out.

* * *

Trial Examiner Spencer: I understood there was no dispute in this proceeding as to the appropriate unit.

Mr. Foley: None now; there was then, [71] though.

* * *

(Testimony of Victor J. Lazzaro.)

GENERAL COUNSEL'S EXHIBIT No. 52

Official Report of Proceedings
Before the
National Labor Relations Board
Case No. 20-RC-780

In the Matter of:

W. T. GRANT COMPANY,

and

RETAIL CLERKS UNION, LOCAL 428, Affiliated With RETAIL CLERKS INTERNATIONAL ASSOCIATION, A. F. OF L.

Place: San Francisco, California.

Date: March 3, 1950.

Mr. McTernan: May I ask Mr. Foley, as long as we are having these long discussions about Company principle, I would like to ask one question for the record: Does the Company principles, these principles you mentioned, preclude the Company from entering into an agreement or a consent election when there are no issues involved in the representation proceeding?

Mr. Foley: Yes, yes.

* * *

Received in evidence Nov. 13, 1950.

Mr. Kennedy: Now, Mr. Examiner, I would like to offer in [72] evidence, General Counsel's 53 for

(Testimony of Victor J. Lazzaro.)

identification, which purports to be a copy of the original representation petition filed on January 31, 1950.

Trial Examiner Spencer: Mr. Foley, stipulated that is a copy?

Mr. Foley: Yes, sir.

Trial Examiner Spencer: All right, do you object to receiving it?

Mr. Foley: I do not, no, sir.

Trial Examiner Spencer: It is received.

* * *

GENERAL COUNSEL'S EXHIBIT No. 53

United States of America

National Labor Relations Board

Form NLRB-502

PETITION

Important—Read Carefully

When this Petition is filed by a labor organization or by an individual or group acting in its behalf, the Petition will not be processed unless the labor organization and any national or international of which it is an affiliate or constituent unit have complied with Section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions.—Submit an original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

(Testimony of Victor J. Lazzaro.)

If more space is required for any one item, attach additional sheets, numbering item accordingly.

Attachments Required.—Except when this Petition is filed by an employer under Section 9 (c) (1) (B) of the act, there must be submitted with the Petition proof of interest in the form of dated authorization or membership application cards, or other documentary evidence signed by employees, together with an alphabetical list of their names.

Do Not Write in This Space

Case No. 20-RC-780.

Date Filed: 1/31/50.

Compliance Status Checked By: es.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority:

1. Purpose of this Petition (Check only the one box which is appropriate)

A. ☒ RC—Certification of Representatives (Individual, Group, Labor Organization).—
A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner, and Petitioner desires to be certified as representative of the employees for purposes of collective bargaining, pursuant to Section 9 (a) and (c) of the act.

(Testimony of Victor J. Lazzaro.)

- B. ☐ RM—Representation (Employer). — One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner as defined in Section 9 (a) of the act.
- C. ☐ RD—Decertification.—A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative as defined in Section 9 (a) of the act.
- D. ☐ UA—Union Shop Authority.—(If employer consents to union shop election, use Form NLRB-510 instead of this Form NLRB-502.) Petitioner is the representative of employees as provided in Section 9 (a) of the act and 30 per cent or more of employees within a unit appropriate for such purposes desire to authorize Petitioner to make an agreement with their employer requiring membership in Petitioner as a condition of continued employment.
- E. ☐ UD—Withdrawal of Union Shop Authority.—Thirty per cent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to Section 8 (a) (3) (ii) of

(Testimony of Victor J. Lazzaro.)

the act desire that such authority be rescinded.

2. Name of Employer: W. T. Grant Company.

3. Address(es) of Establishment(s) Involved (Street and number, city, zone, and State) 146 South First Street, San Jose, California. Head Office: 1441 Bdwy. New York 18, N. Y.

4. Nature of Employer's Business: Retail Variety Store.

5. Description of Unit Involved:

Included: All employees employed at above establishment, except Store Manager, Assistant Store Manager, and Trainees.

6a. Number of Employees in Unit: 34.

6b. Number of Employees Supporting this Petition: 22.

(If you have checked box 1A (RC) above, check and complete Either item 7a or 7b, whichever is applicable.)

7a. ☐ Request for recognition as Bargaining Representative was made on January 5, 1950, and Employer declined recognition on or about January 22, 1950. (If no reply received, so state.)

7b. ☐ Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

(Testimony of Victor J. Lazzaro.)

8. Recognized or Certified Bargaining Agent (If there is none, so state): Name: None.

9. Date of Expiration of Current Contract, if any: None.

(Fill in Item 10 Only if You Have Checked Box 1E (UD) Above.)

10. Date of Election by Which Union Shop Authority Was Granted:

11. Parties or Organizations Which Have Claimed Recognition as Representatives: Name: Retail Clerks Union, Local 428 (Retail Clerks International Association). Affiliation: A.F.L. Address: San Jose, California, 84 So. First Street. Date of Claim: Jan. 5, 1950.

12. Other Unions Interested in the Employees Described in Item 5 above (If none, so state) Name: None.

13. Declaration: I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

RETAIL CLERKS UNION,
LOCAL 428,
Petitioner.

Affiliation, if any: Retail Clerks International Association, A. F. of L.

(Testimony of Victor J. Lazzaro.)

Signature of representative or person filing
petition:

By /s/ JAMES P. McLOUGHLIN,
Secretary-Treasurer.

Address: 84 South First Street, San Jose, Calif.

Telephone number: CYpress 2020.

Willfully False Statement on this Petition Can
Be Punished by Fine and Imprisonment (U. S.
Code, Title 18, Section 80.)

Received in evidence Nov. 13, 1950.

Cross-Examination

By Mr. Foley: [74]

Q. On March 3, 1950, at San Francisco, in the
NLRB office, did you meet Mr. Kihs in connection
with the representation hearing?

A. Was that the date that the hearing was held?

Q. Yes. A. I saw Mr. Kihs.

Q. Did you tell him that the store had adopted a
five-day week in order to lick the union, or words
to that effect? [75]

A. I may have; I don't recall.

Q. You were pretty close to these girls who
signed cards, weren't you?

A. You mean am I married to them?

Q. No, I mean they had your confidence, didn't
they? In connection with wages and hours and
working conditions?

(Testimony of Victor J. Lazzaro.)

Mr. Kennedy: Object, Mr. Examiner.

Mr. McTernan: I don't see the materiality.

Trial Examiner Spencer: Could you give me a clue as to your preference there?

Mr. Foley: I want to bring out whether the witness knew that a five-day week was in effect in that store long before March 3rd.

Trial Examiner Spencer: Your question goes to the matter of the five-day week?

Mr. Foley: That's right.

Trial Examiner Spencer: He may answer.

Were you close to the girls, did you know them well?

The Witness: I knew them; I met with them at meetings; I spoke to them and with them.

Q. (By Mr. Foley): Did you know that Helen Simpson worked five days a week since 1943?

A. I didn't know Helen Simpson.

Q. Did you know that Alma Harrison worked five days a week since 1944? [76]

A. I didn't know Alma Harrison.

Q. Did you know that Ann Sunseri worked five days a week since June, 1945?

A. I don't recall the name, Mr. Foley.

Q. Eleanor Rose, did she work five days a week since November, 1945?

A. I didn't know her.

Q. Mary Covell worked five days a week since March, 1946?

A. The name is unfamiliar to me.

(Testimony of Victor J. Lazzaro.)

Q. Adeline Lowewen worked five days a week since November of 1946.

A. I didn't know that; I know her.

Q. You have her card there. Grace Sellers worked five days a week since December, 1946?

A. I didn't know that.

Q. Caroline Silva worked five days a week since September of 1947; namely, the date of her employment.

A. Are you testifying, Mr. Foley, or are you asking me?

Q. No, I am wondering whether you knew that.

A. I didn't.

Q. You did not.

A. I did not. I have the general knowledge that a few girls, a very few, had the five-day week.

Q. You would base your familiarity with working conditions on the statement you have just made, that very few out of the [77] store had a five-day week?

A. To my knowledge.

Q. Did you know that some of the employees in that store prefer six days—six short days, rather than five 8-hour days?

A. Such a discussion was never had by me and the girls.

Q. Did you know, for example, that when Mrs. Guillory—and you have one of her cards there—was employed, she asked for a six-day week?

A. No, sir; the Manager didn't tell me those things.

Q. The Manager didn't tell you? A. No.

Q. And that Mrs. Guillory later asked for a

(Testimony of Victor J. Lazzaro.)

five-day week before the petition was filed, and was put on the five-day week?

A. I don't know.

* * *

Q. You know Mrs. Guillory, don't you? [78]

A. I know the name, but I don't remember the woman.

Q. Do you remember visiting Mrs. Guillory's house and assuring her that her husband would not be beaten up if she didn't join your union?

A. Never had any talk with anyone about anybody else getting beaten up.

Q. You didn't go to her house and talk to her, or anything like that?

A. What does her husband do?

Q. He is a carpenter.

A. I don't remember—I recollect very hazily speaking to her at her home and asking her to join the union, and assuring her that it was a good thing, that we thought that combined we could achieve the things that all the people in the store wanted, the five day week—— [79]

* * *

Q. (By Mr. Foley): Did you ever state to any of the Grant employees in the months of March or April, 1950, that no matter what management said regarding the operation of a closed shop—an open shop, rather—if the union won the election the store would be operated as a union shop?

A. I don't remember saying that.

Q. You might have said it?

(Testimony of Victor J. Lazzaro.)

A. I don't think so.

Q. Will you say with certainty that you didn't say it?

A. I will qualify it, if you want an answer.

Q. Go ahead, qualify it.

A. I may have said to the employees no doubt that they could get the union shop if the union won the election with a tremendous majority voting for it, because that would indicate to the company and it would indicate to the public that the people in Grant's store want the union in the majority, without a doubt.

Q. Did you say that despite anything management might say orally or by way of a notice on the bulletin board, if the union won the election—I will insert, if you wish "by an overwhelming vote"—the store would be a union shop?

A. No. Or, will you rephrase the question; I didn't quite understand, the way that you put it. [80]

Q. You knew that management had posted a notice on the bulletin board—or, rather, information came to you that management had posted a notice on the bulletin board to the effect that the people of this store could join the union, or refrain from joining the union, just as they wished?

A. I knew that such a notice had been posted.

Q. And that the store is operated an open shop in the true sense of the word?

A. I think you told us that.

Q. And that it is the company's policy to em-

(Testimony of Victor J. Lazzaro.)

ploy members of unions as well as non-members, and neither is favored over the other in any aspect of employment?

A. You answered that yourself, "the company is an open shop company."

Q. Did any information come to you to the effect that such a notice was posted on the bulletin board?

A. Yes, and there was another notice passed around that——

Q. Mr. Lazzaro, just confine yourself to this notice, please, for the present.

A. I thought I could amplify that——

Trial Examiner Spencer: Just a minute; answer the question first, and then if you want to amplify it, we will see about it then; but in any event, answer the question.

Q. (By Mr. Foley): Now, in connection with the notice on the bulletin board to the effect that the Grant Company employed union [81] members as well as non-union members, and nobody would be required to join the union as a condition of employment, did you say to any employee of W. T. Grant Company that despite either a notice, or anything said orally by the management, if the union won the election overwhelmingly this store will be operated as a union shop?

A. I said it could be.

Q. Not that it would be?

A. I just said it could be.

Q. You didn't say it would be?

(Testimony of Victor J. Lazzaro.)

A. No, I didn't. [82]

Q. (By Mr. Foley): Did you, on or about March 16, 1950, visit the Grant store and hand out notices of a meeting to be held on the 17th of March, 1950?

A. I visited the store some time around that time for that purpose, yes.

Q. Did you spend most of the afternoon of that day in the store?

A. I don't remember how much time I spent in the store.

Q. Did you put one of the notices of meeting on the time clock in the store?

A. I don't remember doing that.

Q. Did you go to Mrs. Pasut and finger her trousers in the men's and boys' department, of which she was in charge, and say that you wanted her to measure you for a pair of trousers?

A. After I distributed my cards I had a shopping list that my wife had given me earlier, and I was shopping for some goods in the store.

Q. Did your wife tell you to buy trousers for yourself? A. Sometimes my wife——

Q. Did she on this occasion?

A. Sometimes she reminds me that I am low on something.

Q. Did she remind you on this occasion?

A. I don't remember that. [83]

Q. Did you buy trousers from Mrs. Pasut?

A. I don't remember doing so.

Q. Did you go to the curtain counter and muss up or upset the display on the counter that day?

(Testimony of Victor J. Lazzaro.)

A. I don't remember upsetting anything, Mr. Foley.

Q. Do you remember going to the curtain counter?

A. I remember going to every department in the store.

Q. Do you remember touching the merchandise on the curtain counter?

A. Not specifically. [84]

* * *

Q. (By Mr. Foley): In connection with your visit to the store on December 16, 1950, Mr. Lazzaro, did you talk to any customers on that occasion?

A. I don't remember visiting the store on November 15th.

Q. March 16th, 1950?

A. I may have.

Q. Did you say or announce to customers nearby that "I don't want you to patronize this store; it is unfair to the union." [89]

* * *

The Witness: May I hear the question?

Q. (By Mr. Foley): Did you, on your visit to the store on March 16, 1950, talk to customers?

A. I may have.

Q. Did you announce to any customers, "Don't patronize this store; it's unfair to the union," or words to that effect?

A. I don't remember saying that. [90]

* * *

Q. (By Mr. Foley): As we were parting, Mr.

(Testimony of Victor J. Lazzaro.)

Lazzaro, on January 25th at the Sainte Claire Hotel, did I tell you that I handle all labor relations matters and I would rather you deal with me than through Mr. Kihs, that his job was to operate a store?

A. You may have said that, sir.

Q. And that there wouldn't be any additional time because we could communicate by wire or air mail?

A. You implied that, and said it directly.

Mr. Foley: That's all.

Trial Examiner Spencer: At any time during that January 25th meeting, did Mr. Foley, or did Mr. Kihs any time during that meeting, state that the company would sign a consent election if you filed a petition?

The Witness: Directly, no. [93]

* * *

EVELYN DE JANVIER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kennedy:

* * *

Q. And were you working at the store prior to Christmas of 1949? [95] A. Yes, sir.

Q. And did you hear at that period that a couple of girls had asked for wage increases and had been refused?

(Testimony of Evelyn De Janvier.)

A. I had been told that a couple of them had asked but were refused.

Mr. Foley: I move to strike that out as hearsay.

Mr. Kennedy: I am not offering it for the truth, but the statement is merely preliminary to another question.

Trial Examiner Spencer: All right, it may stand.

Q. (By Mr. Kennedy): After hearing that, did you contact any of the union officials of the Retail Clerks in San Jose? A. Yes, I did.

Q. And did you subsequently attend a meeting at which other Grant employees were present?

A. Yes, I did; but may I go into that first one a little bit differently?

Q. If you like.

A. The question asked me, if I had contacted the union; the girls in the store, we had talked about it, and they all wanted to go—not all, but the majority of them wanted to go into it, but nobody would go up to the union to see about it, is the reason I went up.

Q. Do I understand your comment correctly, the other girls wanted it as much as you, but you, in their behalf as well as your own, contacted them? [96] A. That's right.

Q. Now, do you recall approximately when the first union meeting was held at which Grant employees came?

A. Offhand, I don't. It was after the first of the year, but I don't remember just when. [97]

(Testimony of Evelyn De Janvier.)

* * *

Q. Now, did you also attend a second union meeting? A. Yes, I did.

Q. And approximately when was that with relation to the first one?

A. I don't have any idea when it comes to dates; I am very poor.

Q. Would you say it was within a period of two or three weeks after the first one?

A. About three weeks.

* * *

Q. Now, do you recall an occasion after this organization started at which there was a meeting in the store at which Mr. Kihs made some statements with respect to hours and wages? Do you remember such a meeting? A. Yes, I do.

Q. Do you have any recollection now, as to the approximate date at which this meeting occurred?

A. No, I don't have any idea what date that was.

Trial Examiner Spencer: Could you state whether it was before or after the second union meeting that you testified about? [98]

The Witness: I do believe it was after the second meeting.

Q. (By Mr. Kennedy): Do you recall getting a wage increase somewhere around the first two or three months of 1950?

A. I believe we got our wage increase the same time that Mr. Kihs told us of our changing from six days to five.

(Testimony of Evelyn De Janvier.)

Q. And that was approximately what period, if you can remember?

A. That was after our second meeting, sometime.

Q. Now, prior to that meeting—strike that.

Do you recall an occasion in 1950 when you took a day off to go fishing? A. Yes.

Q. And do you remember what date that was?

A. The 29th of April.

Q. Now, do you recall on the following Monday that you were showed a letter by Mr. Kihs?

A. Yes, I was. [99]

* * *

Q. Now, what can you recall now about the contents of that letter?

A. As I recall it, it was that the San Jose store would close before it would be unionized; it would take its business elsewhere. [100]

* * *

Q. (By Mr. Kennedy): Merely for the purposes of refreshing your recollection and pointing up my questions, Mr. De Janvier, I am going to hand you a notice which Mr. Foley informs me was posted on the bulletin board and which I accept as being correct, and ask you when you first noticed that such a notice was put on the board?

A. I would say the beginning of February, or sooner; I believe it was in February.

Q. And when is the last time that you noticed it posted on the bulletin board?

A. I believe Friday.

(Testimony of Evelyn De Janvier.)

Q. This last Friday? A. Yes. [101]

* * *

Mr. Kennedy: I will offer it in evidence.

Trial Examiner Spencer: Mr. Foley, you stipulate No. 56 into the record, don't you?

Mr. Foley: Yes, sir.

Trial Examiner Spencer: Very well, received.

* * *

GENERAL COUNSEL'S EXHIBIT No. 56

Notice

There is a rumor that sooner or later you will be required, as a condition of employment, to join a labor union.

There is not a grain of truth in this rumor.

You don't have to join, nor need you refrain from joining any union to work at Grants.

This store is an open shop in the true sense of the word.

It is our policy to employ members of unions as well as non-members and neither is favored over the other in any aspect of employment.

This policy will not be changed.

/s/ F. J. KIHS.

Received in evidence Nov. 13, 1950.

* * *

Q. (By Mr. Kennedy): Mrs. De Janvier, in accordance with Mr. Foley's suggestion, and also, I think it is a good idea myself, I am going to ask

(Testimony of Evelyn De Janvier.)

you to inspect this document bearing date of April 27, 1950, and ask you if your recollection indicates that is the letter that you saw.

Trial Examiner Spencer: In Mr. Kihs' office.

The Witness: That looks and seems to be very much like it, and I can see now where we got our name.

Q. (By Mr. Kennedy): To the best of your recollection, is this the letter?

A. That is it.

Mr. Kennedy: Well, if that is the letter, Mr. Foley, and if you feel that your files can be unburdened of this original, [107] I will offer this in evidence.

Mr. Foley: All right.

Mr. Kennedy: I will ask that it be marked for identification as General Counsel's Exhibit No. 58.

* * *

Trial Examiner Spencer: Received.

* * *

GENERAL COUNSEL'S EXHIBIT No. 58

April 27, 1950.

Mr. F. J. Kihs

#331, San Jose, Calif.

I received your letter this morning, and my inclination was to write to you immediately to the effect that it is settled Company policy that we will not operate a union shop in San Jose or elsewhere. However, in order to make assurance doubly sure, I decided to "check" with Mr. Lustenberger, but

(Testimony of Evelyn De Janvier.)

I wasn't able to reach him until a few minutes ago.

As a result of my conversation with him I think we can take a definite position to the effect that we will not agree to a union shop in San Jose under any circumstances, and further that if we can't do business in San Jose on an open shop basis, we just won't do business in San Jose. I trust that you still have posted the notice to the effect that no one need join the union in order to work in Grant's. If by chance that notice was taken down I suggest you put it up again.

/s/ E. M. FOLEY

EMF/ad

Air Mail

cc: Mr. H. E. Maroney

Mr. J. D. Hardman

Received in evidence Nov. 13, 1950.

Q. (By Mr. Kennedy): I am going to ask you to consider again, if you will, please, Mrs. De Janvier, the occasion on which Mr. Kihs addressed the girls at a meeting in the store, concerning change of work week, and will you tell us whether anything else was said other than what you have already told us?

A. Outside of our changing day and raise in pay, I believe he said that any of the girls that wanted to join the union were free to do so, that we did not have to join the union to work in the

(Testimony of Evelyn De Janvier.)

store, that they would hire either union or non-union alike.

* * *

Q. And did I understand you to say that you got a wage increase about the same time, or shortly after? A. Yes. [109]

* * *

Cross-Examination

By Mr. Foley:

* * *

Q. You and Mrs. Kleidon are very good friends, aren't you? A. Yes, we are.

Q. And you made a statement for the General Counsel, didn't you? A. Yes, I did.

Q. And General Counsel told you you would have to come up to Union headquarters to give a statement? A. That's right.

Q. That the Government required you to go to Union headquarters? A. That's right.

Q. And you told the General Counsel that you were very friendly with Mrs. Kleidon?

A. That's right.

Q. And you also told the General Counsel that you and she kidded around with one another, and fooled around with one another? [111]

A. That's right.

Q. Passed remarks with one another?

A. That's right.

Q. That the General Counsel then told you he didn't want anything like that in the statement, didn't he?

(Testimony of Evelyn De Janvier.)

Trial Examiner Spencer: Mr. Kennedy keeps trying to get in something here.

Mr. Kennedy: I want to object to that as being immaterial and irrelevant.

* * *

Trial Examiner Spencer: Mrs. Kleidon, what is her position, is she a supervisor?

Mr. Foley: Yes, sir; she was a war-time Assistant Manager.

Trial Examiner Spencer: Would she come under the term [112] "supervisor"?

Mr. Foley: Yes, she would.

Q. (By Mr. Foley): Well, Mrs. De Janvier, what were the circumstances under which Mrs. Kleidon spoke to you about the "pretty union button"?

A. Very kiddingly.

* * *

NELLIE PUTNEY

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kennedy:

* * *

Q. Do you recall if a wage increase in the early part of this year—

A. Yes.

Q. Can you fix the time by any other events when this rate increase occurred?

A. It must have been just before—well, in the latter part of February.

(Testimony of Nellie Putney.)

Q. And how do you arrive at the fact that it occurred about that time?

A. I went on my vacation February 27th and I got it in the pay check on my vacation.

Q. Now, do you recall whether or not shortly before you went [116] on your vacation there was a meeting in the store at which Mr. Kihs made some remarks about wage increases and five- or six-day week?

A. Yes.

Q. And how long before you went on your vacation did this meeting occur?

A. I would say about a week.

Q. Will you tell us what you remember about what was said at that meeting by Mr. Kihs?

A. Mr. Kihs told us that he had discussed it with the other people in the company and that they had found that the other stores in San Jose were on five-day week and that we should be on five-day week, that we would receive five-day week and a pay increase, and there would be no need for us to join the union unless we felt that we wanted to, we would be an open shop store.

* * *

Q. And when you came back from your vacation, did you wear your union button?

A. Yes, I did.

Q. Was there any remark made to you by anyone concerning your union button at that time?

A. Mrs. Kleidon—just kiddingly, I guess, to keep me from getting embarrassed—asked me if I was the only girl in the [117] store that was in the union—jokingly, you know.

(Testimony of Nellie Putney.)

Q. And what did you say?

A. I didn't know what to say. I just took the button off.

Q. Did you notice at that time that you were the only one in the store with a button?

A. No, I didn't pay any attention.

Q. Did you notice whether or not at that time any of the other girls did have union buttons on?

A. No.

Q. Do you have any explanation as to why Mrs. Kleidon should have asked you that question?

A. Well, knowing me, she felt that if I were the only girl wearing a button I would be embarrassed.

* * *

Q. (By Mr. Kennedy): I am going to show you General Counsel's Exhibit 58, Mrs. Putney, and ask you whether you have ever seen [118] that before?

A. Yes.

Q. And would you state under what circumstances, please?

A. Yes; Mr. Kihs showed the letter to me on a Saturday morning.

* * *

Q. Do you remember at the time you saw that letter whether Mr. [119] Kihs had anything to say?

A. He just asked me who I believed.

* * *

Q. Do you remember noticing anything after Mr. Kihs showed the letter to you?

A. He showed it to Betty Guillory.

Q. And after that did you have a conversation

(Testimony of Nellie Putney.)

with any of the other employees about the contents of that letter? A. Yes, I did.

Q. Would you state—or, I should say, about the contents or the letter itself—is that correct?

A. Yes.

Q. And would you state with whom this conversation occurred? A. Faye Jackson.

Q. And what was it please, the conversation.

A. I asked her what she thought about the letter and if she read it, what she thought about it, and she said if it meant losing our jobs we would just have to forget about the union. [120]

* * *

Q. Now, you know, as a matter of fact, that after Mr. Kihs did mention that there was going to be a wage increase and a change in the work week, that some girls did receive the wage increase and that the working hours were changed from a 40-hour, six-day week to a 40-hour, five-day week?

A. Yes. [121]

* * *

Cross-Examination

By Mr. Foley:

Q. Mrs. Putney, you started with the Grant Company at \$24 a week? A. Yes, I did.

Q. How many hours did you work then?

A. Forty hours, I believe.

Q. Now, at the time of the meeting, where Mr. Kihs announced that everyone would go on a five-day week, you were getting what salary?

A. \$32 a week.

Q. You said that Mr. Kihs announced at that

(Testimony of Nellie Putney.)

meeting that there would be no need to join the union?

A. I guess he didn't say—he said we didn't have to unless we wanted to, we wouldn't be forced to.

Q. Very well; now, you and Mrs. Kleidon are very friendly, are you? A. Yes, we are.

Q. Now, what were the circumstances under which she discussed with you the wearing of your union button?

A. Well, we were on the counter at the foot of the stairs and she put her arms around me and laughed with me, and—you know, joked with me, and asked me if I was the only girl in the union, that she noticed I was still wearing my union [123] button.

Q. That is after you had come back from vacation? A. Yes, the day after I got back.

Q. Were you wearing the same apparel then that you wore before you left on your vacation?

A. Yes.

Q. And you left it at the store, did you?

A. Yes, I did, it was a sweater.

Q. When you put on the sweater were you conscious of the fact that there was a union button on it?

A. Well, I knew it was there; I didn't think anything about it.

Q. Now, when Mr. Kihs showed you the letter, General Counsel's Exhibit No. 58, didn't he say to you, "Now, who do you believe"? A. Yes.

(Testimony of Nellie Putney.)

Mr. Kennedy: Mr. Examiner, I have been furnished by the [124] Respondent, a payroll which includes the week of January 25th with respect to the employees of the San Jose Grant store. I now propose, subject to the concurrence of Mr. Foley, to read into the record the list of employees who were on the payroll as of that date, excluding the supervisory employees.

Mr. Foley: No objection.

Mr. Kennedy: Robert Ellington; Ellington is spelled E-l-l-i-n-g-t-o-n; the next one is Delphie Ferro, F-e-r-r-o; the next one is Alma J. Harrison, H-a-r-r-i-s-o-n; the next one is Tony Intravia, I-n-t-r-a-v-i-a; the next one is Ione H. Williams; Camille Frediani, F-r-e-d-i-a-n-i; Faye Arwood; Florence H. Bernal; B-e-r-n-a-l; Betty J. Beard-sley, B-e-a-r-d-s-l-e-y; Melissa C. Cook, first name is M-e-l-i-s-s-a; Mary A. Covell, C-o-v-e-l-l; Evelyn N. De Janvier, D-e J-a-n-v-i-e-r; Betty Devoni, D-e-v-o-n-i; Omera F. Guillory, G-u-i-l-l-o-r-y; Faye Jackson, J-a-c-k-s-o-n; Adeline Loewen, L-o-e-w-e-n; Rosamond McAllister, M-c-A-l-l-i-s-t-e-r; Pearl A. Nicholson, N-i-c-h-o-l-s-o-n; Martha A. Nix, N-i-x; Rose Ann Pasut, P-a-s-u-t; Nellie M. Putney, P-u-t-n-e-y; Eleanor M. Rose, R-o-s-e; Maxine Rakestraw, R-a-k-e-s-t-r-a-w; Grace Sellers, S-e-l-l-e-r-s; Caroline C. Silva, S-i-l-v-a; Helen B. Simpson, S-i-m-p-s-o-n; Ann M. Sunseri, S-u-n-s-e-r-i; Angel G. Sanchez, S-a-n-c-h-e-z; Flora Bobo, B-o-b-o; Myrtle Nice, N-i-c-e; Mary E. Cahalan, C-a-h-a-l-a-n; Anna M. Krieg, K-r-i-e-g; Dianne

(Testimony of Nellie Putney.)

Minahan, M-i-n-a-h-a-n; Martha Reid, R-e-i-d;
Wanda Wood, W-o-o-d; Lois [125] Reyman, R-e-y-
m-a-n; Delta Server, S-e-r-v-e-r; Celia Myers,
M-y-e-r-s; and Grace Laswell, L-a-s-w-e-l-l.

Mr. McTernan has called to my attention a name
that I omitted—I am just checking now—appar-
ently it was read.

Mr. Examiner, I would like to propose a stipula-
tion to the effect that the names that I have just
read reflect the employees of the Grant store who
are in the appropriate unit and who were employed
in the Grant store for the week including January
25, 1950.

Trial Examiner Spencer: So stipuated?

Mr. Foley: We so stipulate. [126]

* * *

November 14, 1950

MARTHA NIX

a witness called by and on behalf of the General
Counsel, being first duly sworn, was examined and
testified as follows:

Direct Examination

By Mr. Kennedy:

* * *

Q. Now, during the period of your employment
at the Grant store, have you ever had occasion to
wear a union button? A. Yes, we did.

Q. And, specifically, did you, yourself, wear
such a button? A. Yes.

(Testimony of Martha Nix.)

Q. And for about how long?

A. For about two months.

Q. Was there ever any remarks addressed to you concerning this button by any of the management of the store? A. Yes.

Q. And by whom? A. Mrs. Kleidon.

Q. Is she the Assistant Manager? A. Yes.

Q. And when was such a remark made?

A. Well, it was about—between the 10th and 15th of April.

Q. And what do you recall was the remark?

A. Well, she asked me why I was still wearing my union button.

Q. And did you make any reply?

A. I said I don't know, because she said it in kind of a joking way.

Q. Is Mrs. Kleidon a fairly cordial person?

A. Yes.

Q. She is always, pleasant, good-humored, talkative? A. Yes, that's right.

Q. Would you say that is pretty uniform?

A. Yes.

Q. And did you make any response as to why you were wearing your button?

A. I just said something like "I don't know," something like that. I don't remember exactly the words I said.

Q. Can you remember now anything more of that conversation? A. No, that was all she said.

Q. All right. Now, after that did you continue to wear your union button?

(Testimony of Martha Nix.)

A. Well, I put it on the underneath side of my sweater.

Q. And prior to that where was it?

A. On the front. [132]

* * *

Cross-Examination

By Mr. Foley:

Q. You are very friendly with Mrs. Kleidon, are you, Miss Nix? A. Yes. [133]

* * *

Q. How long have you been friendly with her?

A. Since I started working at the store.

Q. You started working on April 18, 1949?

A. That's right.

Q. Did Mrs. Kleidon ever say to you that she would prefer you to take off the button?

A. No, she never said anything like that to me. [134]

* * *

Q. (By Mr. Foley): Did I understand, Miss Nix, that you said that it is merely your recollection that the button was not on the sweater when Mrs. Kleidon returned it, was that right?

A. Yes.

* * *

Q. Would you say that you don't know definitely whether the button was or was not on the sweater when Mrs. Kleidon returned it?

A. That's right, I wouldn't say for sure whether it was or wasn't. [136]

* * *

FRANCIS J. KIHHS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kennedy:

Q. Your name is Frank Kihs?

A. Francis Joseph Kihs.

Q. And you are the Manager of the San Jose Grant store? A. Yes, sir.

Q. And you have had that position for the past year, at least? A. Yes, sir.

Q. And, I will show you General Counsel's Exhibit 55 for identification, and ask you if that is your signature on that letter? A. Yes.

* * *

Mr. Kennedy: I will offer in evidence General Counsel's 55 for identification. [138]

* * *

Trial Examiner Spencer: Received.

* * *

Q. (By Mr. Kennedy): Now, Mr. Kihs, do you recall, on General Counsel's 55 there is an indication that 23 individuals received merit increases; do you recall the dates those wage increases were effected?

A. Well, I can approximate: it was either in January, February or March.

Q. Would you say that they were all instituted at the same time? A. I believe they were.

Q. Now, with respect to the change of hours,

(Testimony of Francis J. Kihs.)

which is indicated on here that 13 girls were changed from a six-day 40-hour week to a five-day 40-hour week, can you tell us when that change occurred?

A. It was either—as I say, I will have to approximate again—it was either January, February or March. [139]

* * *

Q. At the time that these increases were made and change of hours were made, did you consult with the Union with respect to those changes, or any representative of the Union?

A. I do not believe so.

Q. And I am going to ask you, if you will, now, to check and to tell us the dates that these increases were made and the change of hours was effected, if you will, please?

You have checked your records, Mr. Kihs, and can you tell us now when the increases indicated on General Counsel's 55 were effected in your store?

A. February 23rd, the week ending February 23rd.

Q. And that would be the week starting February 16th, is that right? A. That's right.

Q. And the same would be true with respect to the change in the work week from a six-day to a five-day week, with respect to the girls, to the numbers indicated on General Counsel's 55?

A. So far as my records show, that's true.

Q. Now, Mr. Kihs, do you recall an occasion when you had a meeting when you announced that

(Testimony of Francis J. Kihs.)

there was going to be a change in the work week and that everyone would be on a five-day week?

A. Yes, sir. [140]

Q. And about how long before the changes were effected was that announcement made?

A. I would have to estimate again; I would say approximately two or three weeks.

* * *

Q. Before these changes were made, here, from a six-day to a five-day week, did you on occasion change a girl from working a six-day week to a five-day week?

A. Yes, sir; I can cite several cases that I have records of.

Q. You did that frequently? A. Yes, sir.

Q. And with respect to giving a girl a wage increase, before that, on occasion, did you give a girl an increase? A. Yes, sir. [141]

* * *

Cross-Examination

By Mr. Foley: [151]

* * *

Redirect Examination

By Mr. Kennedy: [155]

* * *

Trial Examiner Spencer: Well, now, limiting the scope of my question to the San Jose store, have you ever granted that many merit increases, or more, at any one time previous to February, 1950?

(Testimony of Francis J. Kihs.)

The Witness: Not to my knowledge.

Trial Examiner Spencer: Did you ever grant as many as a dozen at one time previous to February, 1950?

The Witness: It is possible that I did.

Trial Examiner Spencer: I don't wish to mislead you as to what I am trying to get at. I want to know if there is anything unusual in your having granted this number at this particular time.

The Witness: I would say it is very unusual, inasmuch as I have never had an experience where I have had such a number of girls get married—well, I mean, there wasn't a number of pregnancies, there was only one—I never had had so many cases all at one time in my experience with the Grant Company. I realize it was very unusual that a thing like that should happen all at once, in a bundle, as you might say. [159]

* * *

Trial Examiner Spencer: Now, what has been your practice in the San Jose store; have you normally announced merit increases, one at a time, or more than one at a time? What has been your normal practice over the entire time that you have been at the San Jose store?

The Witness: I would say generally they would be in a group.

Trial Examiner Spencer: Well, can you be a little more specific? Do you have a recollection, in other words, on a group that you gave out any time prior to February, 1950?

(Testimony of Francis J. Kihs.)

The Witness: No, sir.

Trial Examiner Spencer: Now, you changed 13—I am still referring to General Counsel's No. 55—from which I see that 13 girls had their 40-hour week changed from six days to five days on about that same date. I would gather from previous testimony I heard here that some girls were already working on a five-day week?

The Witness: Yes, sir.

Trial Examiner Spencer: Prior to this time?

The Witness: Yes, several girls had requested six-day weeks.

Trial Examiner Spencer: You, I presume, did not change a girl from a six-day to a five-day week unless she was agreeable [160] to the idea, did you?

The Witness: No, sir.

Trial Examiner Spencer: And I suppose the other would be true; you didn't change her from a five to a six unless she was agreeable to the idea?

The Witness: Yes, sir. I wish I could mention at this time that it was our practice, upon employing girls—now, it could have been overlooked in certain cases—a girl was put on a six-day week at the time of her employment, but she was informed that any time she felt after—I don't think we set a specific date, such as the month—but we did tell the girls that after a certain period if they wanted to go on a five-day week, all they had to do was say yes and we would put them on a five-day week.

Trial Examiner Spencer: Is that your uniform

(Testimony of Francis J. Kihs.)

policy, that after a period you would put any of the girls on a five-day week upon their request?

The Witness: Yes, sir.

Trial Examiner Spencer: Do you have any particular explanation—there may be none required—as to why you made this effective as to 13 girls at one time?

The Witness: No, sir.

Trial Examiner Spencer: Do you recall whether or not these particular 13 girls had all requested the five-day week at about this time? [161]

The Witness: No, sir. I can remember one girl distinctly having requested it, but I couldn't remember any more than that one.

* * *

Recross-Examination

By Mr. Foley: [162]

* * *

Q. Will you read into the record the names of the people that were on a five-day week prior to January 1, 1950?

A. Yes, sir.

Mr. Kennedy: I want to interpose an objection. I have no serious objection to the contents going in, except that the relevance of the identity doesn't seem to be very strong, and [163] that as of the time, there were a great many people, or the number reflected in General Counsel's Exhibit, that were already on a five-day week that weren't switched to it.

Mr. Foley: If you will concede that, that's

(Testimony of Francis J. Kihs.)

enough, that the majority were already on a five-day week.

Mr. Kennedy: Yes, the majority.

Mr. Foley: All right, that will be enough.

Trial Examiner Spencer: A majority of all employees of the Grant store on a five-day week prior to January, 1950, is that what you are granting, Mr. Kennedy? [164]

* * *

Q. (By Mr. Foley): Now, on or about February 13th, when you announced a five-day week, did that five-day week apply to everyone, including Mrs. Burnell?

A. As I recall, I spoke to Mrs. Burnell and asked if she would like to go on a five-day week, previous to this announcement, and she said she would, and so it did include Mrs. Burnell at that time.

Q. It applied to all female employees?

A. All female employees.

Q. Did it apply to Robert Ellington, the stock man? A. No, sir.

Q. Did it apply to Tony I-n-t-r-a-v-i-a, Intravia—what is his job?

A. Robert Ellington at that time was the porter; Tony Intravia was the stock man.

Q. Did it apply to either of those people?

A. No, sir. [166]

Q. They were kept on a six-day week?

A. Yes, sir.

Mr. Foley: That's all.

Trial Examiner Spencer: Mr. Foley, just so I

(Testimony of Francis J. Kihs.)

understand it, is the point that after the 13 had been placed on a five-day week all of the female employees were then on a five-day week, is that it?

Mr. Foley: Yes, sir.

Mr. Kennedy: That's all the sales people, Mr. Kihs.

The Witness: All female employees excluding supervisors were placed on a five-day week.

Mr. Kennedy: Including the sales girls and office force.

Mr. Foley: All employees except Mrs. [167] Kleidon.

* * *

Mr. Kennedy: Mr. Foley, in lieu of my calling you, perhaps you would like to stipulate that with respect to the promotions, wage increases, and change of working hours in February, 1950, you were not consulted by any representatives of the Retail Clerks Union?

Mr. Foley: No, sir; we were not consulted.

Mr. Kennedy: And that they were instituted without consulting the representatives of said union?

Mr. Foley: Yes, sir; we so stipulate. [176]

* * *

Mr. Kennedy: On further consideration at the moment, I am convinced that probably my procedure leaves something to be desired with respect to—my contemplated effect of making the [178] motion to conform the pleadings to the proof, and with the consent of the Trial Examiner, I should like to make a motion at this time in lieu of such

(Testimony of Francis J. Kihs.)

a motion which I stated I contemplated, to amend paragraph five to include in addition to the material included therein, "and also threatened to close their store and cease operations in San Jose, California, if, or before a union shop would be tolerated by the Respondent." [179]

* * *

Trial Examiner Spencer: Well, I think the amendment should be accepted and that was the amendment to sub-five of paragraph seven of the Complaint, so I will grant the motion to so amend it. [180]

* * *

OMERA GUILLORY

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Foley:

* * *

Q. How many days a week do you work?

A. I work five days a week.

Q. Who employed you?

A. Mrs. Kleidon.

Q. That was in February, 1948?

A. That's right.

Q. Did you have any conversation at that time with Mrs. Kleidon [181] as to the number of days you would work a week? A. Yes.

(Testimony of Omera Guillory.)

Q. Will you relate the conversation, please?

A. She asked me if I'd like six days a week or five days, and I told her at the time I was employed I was just recently out of the hospital and I would prefer working six days a week, which would be six hours and forty minutes a day, I think, and she said any time that I wanted a five-day week come in and tell her; and when I decided I was able to take a five-day week I went and told her and she gave it to me.

Q. And now, subsequent to that, did you have any conversation with Mrs. Kleidon about the length of your—the number of days you would work a week? A. No, not exactly.

Q. Well, at any time thereafter did you change to a five-day week?

A. Yes, I did. After that I went on a five-day week.

Q. About when?

A. Oh, let's see—I'd say after I was working about four or five months, something about that period, when I went to her and told her I thought I could take a five-day week.

Q. That was during the year 1948, then?

A. Yes.

Q. Did you sign a card, a union card, here?

A. Yes, I did. [182]

Q. Did you ever go to any union meetings?

A. No, I didn't.

Q. Do you know Mr. Lazzaro, the gentleman sitting at the end of the table?

(Testimony of Omera Guillory.)

A. Yes, I do.

Q. During the month of January, 1950, after you signed this union card, did you have a conversation with Mrs. Milissa Cook?

A. Yes, I did.

Q. Will you kindly relate——

Mr. McTernan: May we have a foundation on that, Mr. Examiner, of who Mrs. Cook is?

Trial Examiner Spencer: Who Mrs. Cook is, etc.

Mr. McTernan: Where the conversation was held, who was present.

The Witness: The conversation was held in front of the store, and at that time there was no one present except she and I; I happened to be on a lunch hour and she was talking to me.

Q. (By Mr. Foley): About the union?

A. Yes, about the union.

Trial Examiner Spencer: Who is Mrs. Cook?

The Witness: An employee of Grant's.

Mr. Kennedy: I now want to register my objection to the conversation between this witness and Mrs. Cook as not having any evidentiary value as to proving the truth of what such conversation might be. [183]

Trial Examiner Spencer: What is the——

Mr. Foley: I want to show the coercion.

Trial Examiner Spencer: These are two employees talking between themselves?

Mr. Foley: Yes, sir.

Trial Examiner Spencer: Well, I will take it,

(Testimony of Omera Guillory.)

and then if it seems improper, I will hear a motion to strike it.

Q. (By Mr. Foley): Will you relate the conversation, Mrs. Guillory?

A. Well, she had said to me when I was walking down to the floor, she said, "Did you hear what was said?"

And I said, "No, not exactly; what was said?"

And she said, "Well, it was brought to my attention that somebody suggested that I have your husband beat up if you don't join the union and go to all the union meetings." [184]

* * *

Q. (By Mrs. Foley): And subsequent to this conversation with Mrs. Cook, did Mr. Lazzaro visit your home? A. Yes, he did.

Q. Did you have a conversation with him?

A. Yes, I did. [185]

* * *

Q. (By Mr. Foley): What was the conversation you had with Mr. Lazzaro?

A. Well, he come up to the house and he asked if he could come in and talk. I said yes and invited him in. It was in the afternoon. He sat down in my kitchen—I have only a two-room apartment—he sat in my kitchen and said it had been brought to his attention that threats—that some of the girls had said they were going to threaten me by my husband being beat up with some of the carpenters if I didn't join the union, and he'd come down to

(Testimony of Omera Guillory.)

tell me they didn't go in for hoodlumism, and stuff like that.

* * *

Q. (By Mr. Foley): Now, did you subsequently see Mr. Lazzaro in the W. T. Grant Company store? A. Yes, I did.

Q. How much time elapsed between his visit to your home and when you saw him again at the Grant Company store, about?

A. Well, not too long. [186]

Q. A matter of weeks?

A. I think a matter of weeks—not months.

Q. About how many weeks?

A. I'd say about three or four, maybe.

Q. And what did you observe him doing, if anything, in the W. T. Grant Company store?

A. One thing I particularly noticed was the roughing up of Department 11, which is men's and boys' clothes.

* * *

Cross-Examination

By Mr. Kennedy: [187]

* * *

Q. And do you know whether or not when you saw Mr. Lazzaro as you call "roughing up Department 11" whether or not he was looking for purchases or articles on the counter?

A. Well, we asked if he would like to be waited on and he said no.

Q. Did you ask him?

(Testimony of Omera Guillory.)

A. Yes, I did. My department is right next to that one, was at that time.

Q. Did Mr. Lazzaro hand you a card?

A. Yes, he did.

Q. What did you do with it?

A. Tore it up, and I laid it on the counter.

Q. Did you see what happened to it then?

A. No, I did not see what happened to it. [188]

* * *

ELEANOR ROSE

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

By Mr. Foley:

* * *

Q. Do you remember Mr. Lazzaro visiting the W. T. Grant Company store? A. Yes, I do.

Q. About when?

A. I don't exactly remember.

Q. Have you seen him more than once?

A. Yes, I saw him twice. [189]

Q. I see. Now, on a certain occasion—the occasion I have in mind, you were cutting window shades, were you? A. Yes.

Q. When he visited the store; and will you tell us what, if anything, you observed Mr. Lazzaro doing on that occasion?

A. Well, I was waiting on a customer, cutting window shades, and he come up to me and wanted to give me a card, which I assumed was a union

(Testimony of Eleanor Rose.)

card, to sign and I was waiting on my customer, tending to that, and I didn't pay any attention to him. And when I turned around, he was proceeding to go around my counter, which was between 35 and 40 feet of counter, and just turning my merchandise over, my curtains and things; and when I got through, he was gone already, but the curtains were turned over and had to be all straightened up.

Mr. McTernan: May I move to strike that part of the answer that says Mr. Lazzaro wanted to give her a card which she assumed was a union card, to sign, those words beginning with "wanted to give her a card, which she assumed was a union card, to sign."

Trial Examiner Spencer: I can strike the assumption, if that is what you refer to. All right, the assumption may be stricken.

Q. (By Mr. Foley): Did what Mr. Lazzaro did require you to do any work that day?

A. Yes, it did; it took me at least 20 minutes to a half hour [190] to straighten it up.

Q. Had you ever signed a union card?

A. No, I didn't.

Q. Before that; have you ever signed one since?

A. No, sir; I was never approached by anyone to sign one inside the store or out, other than that one day. [191]

* * *

PEARL NICHOLSON

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Foley:

* * *

Q. When were you employed by W. T. Grant Company?

A. I believe it was the latter part of June, 1948.

Q. What was your work week, in the number of days that you worked per week, then?

A. When I first started I was on a six-day week. I was living in town at that time, and in September of '48 we bought our home in Los Gatos and I have to come to work with my husband because [196] I don't have any other way of commuting, so Mrs. Kleidon talked to me and she said that she thought that being that I lived out so far, would I prefer to be on a five-day week which would be much better, because I wouldn't have to wait till ten to ten to go to work. So she put me on the five-day week.

Q. Do you know Mr. Lazzaro, the gentleman leaning over Mr. McLoughlin's shoulder now?

A. Yes, I do.

Q. Did you ever see him in the Grant store?

A. Yes, sir.

Q. How many times?

A. Oh, offhand I couldn't say; I've seen him several times.

(Testimony of Pearl Nicholson.)

Q. In the Grant store?

A. I think a couple of times in the Grant store, the other times in the front of the store.

Q. How many times did you see him in the store—more than once? A. I believe so.

Q. Now, did you ever see him in the yard goods counter? A. Yes, sir.

Q. Will you tell us what you observed, if anything, at the yard goods counter?

A. Well, on this particular day I was waiting on a customer and Mr. Lazzaro approached me and tried to hand me a card; I presumed it was about a meeting—I could be mistaken. Mr. Kihs [197] and Mr. Burton were near him, I believe, at the time; I couldn't say definitely the conversation that went on between Mr. Kihs and Mr. Burton, because I was busy at the time waiting on my customer. I believe Mr. Kihs asked Mr. Lazzaro not to bother the girls while they were busy working, and he tried again to hand me the card, but I didn't pay any attention, I kept on measuring material for the lady I was waiting on. And Mr. Kihs, Mr. Lazzaro and Mr. Burton were all talking, and I didn't pay any attention to the conversation, because at the time I was busy, and after a short conversation, Mr. Kihs and Mr. Lazzaro had, Mr. Lazzaro went around to the yardage and was picking up pieces of material and stringing it out over the counter, and then he asked me for a yardstick. Well, I had finished with my customer and I approached Mr. Lazzaro to see if maybe I could help him; maybe,

(Testimony of Pearl Nicholson.)

perhaps he wanted something. So he asked me for a yardstick and I gave it to him, and he said to me, "Well, how wide is this material?"

I said, "36 inches."

And then he started to walk around the counters and I went behind him and straightened up the materials to the best of my ability and proceeded to help other customers that had come up during that time.

Q. Did you see him at Miss Rose's department that day? A. Yes, sir.

Q. What did you observe there? [198]

A. Well, I noticed he was fooling with the curtains. [199]

* * *

FRANCIS J. KIHS

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows: [200]

Direct Examination

By Mr. Foley:

Q. When did you first meet Mr. Lazzaro?

A. I believe it was January 5, 1950, when he came into the store and told me that he represented a union, and that they had organized a majority of our employees.

Q. Now, on the 6th, I think there is evidence that you received a letter from the Union?

A. Yes, on the 6th I received a letter from the

(Testimony of Francis J. Kihs.)

Union and I also received a telephone call from a man that said his name was Mr. McLoughlin and he was an official of the Union. He asked me if I had taken any action on the letter; I instructed him that I had forwarded it to Mr. Foley of our legal department, but I recommended that he petition the Board for—the National Labor Relations Board for an election.

Q. Did you have any subsequent conversation with Mr. McLoughlin?

A. I'd say approximately, oh, a week or two later, Mr. McLoughlin called me and asked me who Mr. Foley was, and I told him to the best of my knowledge he was the head of our legal department. At that time I didn't understand that you were the head of the labor relations department; I understood that you were the head of the legal department—and that I'd suggest he contact you in regard to anything, but I did state that he should petition the National Labor Relations Board for an election; and at that time Mr. McLoughlin stated, "Well, we had better wait until Mr. Foley comes out, and we will discuss it," or words to that [201] effect. I am not sure if that is his exact answer.

* * *

Q. Did you attend the conference of January 25 at the Sainte Claire Hotel?

A. Yes, sir. [202]

Q. And was there a discussion between Mr. McLoughlin, Mr. Lazzaro, you, and myself with reference to the Union's claim of representation?

(Testimony of Francis J. Kihs.)

A. Yes, sir. As I recall, at that time you stated the company policies, which were that the company felt that any employee of the Grant Company could join a union or refrain from joining a union, or, if after having joined a union, he could resign as he saw fit, without any obstruction from the management.

Q. Did you hear me say anything at all about a willingness to consent to an election?

A. No, sir; you definitely stated—the only thing I recall your stating was that they should petition the National Labor Relations Board for an election.

Q. Do you remember any conversation with reference to a union shop, or was that the conversation?

A. That was the conversation I just related.

Q. What did Mr. McLoughlin say to that?

A. As I recall, Mr. McLoughlin said, “We just can’t go for that.” He may have said something else, but I can’t recall it. [203]

* * *

Q. (By Mr. Foley): Now, early in the month of February, 1950, did you hear any rumors at all with reference to the possibility of the store’s becoming a union shop?

* * *

The Witness: Yes, I did hear rumors to the effect that if the store was organized it would definitely be a union shop, and at that time, or a little while later, I did post a notice to the effect

(Testimony of Francis J. Kihs.)

that our store would always allow the employees to join unions, or not join unions, as they saw fit, and if they wanted to join the union, they could join without prejudice by the management.

Q. Now, in April, and more specifically, after a union meeting held on April 24th, did you hear any comment in the store about [205] that notice?

A. Yes, sir.

Q. From whom? A. From Mrs. Guillory.

Q. And what did she tell you?

* * *

The Witness: I received notice that in spite of what I had said, in spite of the notice that I had posted on the bulletin board, that if the union won the election that we would have the union shop; and at that time I wrote to Mr. Foley, and his reply was that particular letter—that is posted, I believe, in evidence.

Trial Examiner Spencer: Yes, it has been received in evidence. You may want to get the exhibit number of that letter in order to make the reference clear. [206]

Mr. Foley: The letter is 58.

Trial Examiner Spencer: General Counsel's Exhibit No. 58.

Showing you General Counsel's Exhibit No. 58, is that the letter you had reference to in your testimony?

The Witness: Yes, sir. [207]

* * *

(Testimony of Francis J. Kihs.)

Redirect Examination

* * *

RESPONDENT'S EXHIBIT No. R-1

4/25/50

Dear Mr. Foley:

As I mentioned in my letter of 4/24 the Union called a meeting of the evening of 4/24.

I have received the following information regarding the meeting:

Five of my people attended.

They were told that in spite of any statement I had made that if the Union gets in this store will be a Union shop and not an open shop.

They also stated that in order to have the Union in the store they would only need seven votes in favor.

They also stated that if they lost this store they would be licked in San Jose and would have to leave town.

The above covers pretty much what took place in the meeting. Of course my information is second-hand so I am just quoting another person's word.

I just recalled another thing. They were told that the election would take place in the near future, so the Union planned to call one more meeting.

(Testimony of Francis J. Kihs.)

Is there any action I should take to combat the above statement?

Yours,

/s/ FRED KIHHS,

331.

Received in evidence Nov. 14, 1950.

Mr. McTernan: May we have the manual or the pages marked for identification that the witness is testifying from? [223]

* * *

Mr. Foley: I will offer it in evidence.

* * *

Trial Examiner Spencer: All the objections previously stated will go to the receipt of this in evidence; I understand that. I am going to receive it in evidence.

(The document heretofore marked Respondent's Exhibit No. 2 for identification was received in evidence.) [224]

* * *

RESPONDENT'S EXHIBIT No. R-2

The Grant Store Manual

Dated: Jun. 21, 1950. Chapter 7

—7—

Sometimes customers ask to be served by union salesperson and even go so far as to ask salesperson to identify herself as a union member by signing sales slip. Standard practice does not permit sign-

(Testimony of Francis J. Kihs.)

ing of sales slips or any other paper for customers. If salesperson wishes, she may answer customer's question as to whether or not she is a member of labor organization but she may Not refer to other salesperson as either union or non-union. No salesperson may intercede in any transaction between a customer and another salesperson if customer's sole objection to latter's service is based on union or non-union status of such a salesperson. Such a practice would cause humiliation and discord among store employes and therefore is not permitted. It is obligation of each employe to devote his time to Company business during working hours. This obligation is not fulfilled when salespeople join customers in any activity which is not related to Company business. Hence organizational activities and soliciting of members is not to be permitted, but if Manager has been lax in enforcing foregoing requirements, he cannot consistently prohibit organizational activities without being subject to charge of being opposed only to those discussions which relate to unionization.

d. Relations With Individual Employes

Manager is not to be curious or in any way interested as to whether an employe does or does not belong to union, or the extent of an employe's union activities. No one is to be favored because of membership or non-membership in any union.

If an employe asks advice as to whether she should or should not join a union Manager may state:

(Testimony of Francis J. Kihs.)

“That is a matter for you to decide for yourself. Naturally I don’t know what the union expects to accomplish but any attempt to get you to join should bring to your mind such questions as:

“Since the Grant Company’s policy is to pay at least as much as competitors, how can this union help me?

“Why have these total strangers suddenly become interested in me? Are they interested in my personal individual welfare or have they a selfish motive? Is it better for me to deal with the Store Manager when I have something on my mind, or it is better for me to have this union speak for me? Do I know enough about them to warrant placing my future in their hands? (You know, of course, that if you decide to have a third party represent you, you will have to pay for such representation.)

“Personally, I feel that the Company has been a leader in improving employment conditions, with its vacation policy, retirement plan, group insurance, employees’ discount, Christmas bonus, and so forth. I know that the Company will continue to try to make Grant’s the best place to work whether you do or do not join a union.”

An employee’s union membership does not change his relationship to the Company. If his membership is regarded by management in a frowning

(Testimony of Francis J. Kihs.)

manner his feeling of good will toward the Company is apt to be imperiled.

—8—

The fact that employes organize for collective bargaining does not restrict their privilege of presenting individual grievances to management. Freedom of expression by employes is to be encouraged. Frank and constructive criticisms of policies or methods are invited and should in no case reflect to disadvantage of person who offers them. Every complaint is to be given careful consideration and corrective action taken when complaint is justified. When not justifiable, reason is to be patiently explained to employe.

When Manager had ample opportunity to observe employes performance and has overlooked poor performance, a discharge for inefficiency during or after organizational activity will be looked upon with suspicion. It will seem that reason assigned for dismissal had not been regarded, prior to unionizing, as sufficient grounds to warrant dismissal. The longer one is employed, the more unfair a discharge for inefficiency appears, for long service of itself casts doubt on Manager's motive in dismissing employe, during organizational activity or, if the employe was actively engaged in the unionization campaign, after the campaign is over.

When employe is to be reprimanded or criticized, it is not to be done publicly. Disciplinary action is to be prompt and equal in similar cases. Unless

Trial Examiner Spencer: What is your purpose, what do you offer them for?

Mr. Foley: My purpose is to show that the Respondent filed a brief in the representation proceeding on March 24, 1950, [228] and that on March 29, 1950, the Board received an application from the Petitioning Union to file an answering brief. My purpose is to show that on that date there was no great haste on the part of the Union, for the Union itself was asking for additional time, when the election could have been expedited upon its waiving any theories it might have about the unit which had been agreed upon at the representation hearing.

Trial Examiner Spencer: Those three papers have to do with this particular matter?

Mr. Foley: Yes, sir.

Trial Examiner Spencer: Well, I think I understand the objection to it; we have quite a few papers bearing on the representation proceeding which may or may not have weight; I see no reason for not receiving these. They are received.

(The documents heretofore marked Respondent's Exhibits 3, 4, and 5 for identification were received in evidence.) [229]

* * *

(Testimony of Francis J. Kihs.)

RESPONDENT'S EXHIBIT No. R-3

National Labor Relations Board
Washington, D. C.

Form NLRB—1419

Date: March 24, 1950.

In re: 20-RC-780

W. T. Grant Company

Gentlemen:

This is to acknowledge receipt of your brief on behalf of the Company filed with the Board in the above-entitled matter, which has been referred to the Board for consideration. Please forward us one additional copy of your brief.

Very truly yours,

/s/ LOUIS R. BECKER,

Associate Executive Secretary.

Sent 3/30/50.

Received in evidence Nov. 14, 1950.

RESPONDENT'S EXHIBIT No. R-4

National Labor Relations Board
Washington, D. C.

Form NLRB-1419

Date: March 31, 1950.

In re: 20-RC-780

W. T. Grant Company

Gentlemen:

This is to acknowledge receipt of your one additional copy of your brief on behalf of the Company, filed with the Board in the above-entitled

(Testimony of Francis J. Kihs.)

matter, which has been referred to the Board for consideration.

Very truly yours,

/s/ LOUIS R. BECKER,

Associate Executive Secretary.

Received in evidence Nov. 14, 1950.

RESPONDENT'S EXHIBIT No. R-5

Confirmation Copy

"This is a Confirmation Copy of a Message Telephoned to Miss A. Dlag on 3-29 at 1151a."

General Services Administration, Public Buildings Service Watkins 4-3449, Message Telephoned by Del Gardio.

Book NY

147 NY WA W T Grant Company Att Eugene M
Foley 1441 Broadway NY

V/49 WA WAL /NLRB/

Washington 3-29-50 1110A

Re W. T. Grant Company, 20-RC-780, Petitioner's Request for Extension to File Briefs Denied.

NATIONAL LABOR

RELATIONS BOARD.

20-RC-780

TR 111A /JD 1130A/

Received in evidence Nov. 14, 1950.

Mr. Foley: Mr. Burton, will you take the stand, please?

RODERICK BURTON

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Foley:

* * *

Q. Do you know Mr. Lazzaro? A. I do.

Q. Did you ever see him in the W. T. Grant Company store? A. Yes, I have.

Q. How many times?

A. Oh, quite a few times.

Q. About how many?

A. Three times, that I recall.

Q. Did you ever see him at the curtain [230] counter? A. I have.

* * *

Q. (By Mr. Foley): Will you please state what you saw on that occasion?

A. Well, I see Mr. Lazarro come and just upheave the whole counter, take the merchandise and——

Q. What counter? A. Curtain counter.

Q. Yes. A. Besides other counters.

Q. What other counters?

A. The yard goods counter.

Q. What did you observe as to the yard goods counter? [231]

A. Besides tearing the merchandise apart and just stringing it all out, all over the place, he tried to——

(Testimony of Roderick Burton.)

Q. Did you see that?

A. I certainly did.

Q. Don't assume that we know what you saw—tell us what you saw.

A. He just went right along and pulled everything out, took the stuff from the bottom and pulled it up to the top, so that everything would fall over the place.

Q. Did you talk to him about it?

A. I told him that it wasn't very good practice to do something like that.

Q. What did he say to you, if anything?

A. Well, he said, "I'm looking, I'm looking."

Q. Did you hear him speak to any customers?

A. He certainly did.

* * *

The Witness: He said, "Lady, don't patronize this store; they're unfair." [232]

* * *

EUGENE M. FOLEY

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows: [233]

Direct Examination

* * *

By Mr. Hofvendahl:

Q. Did you have a meeting in San Jose, California, on January 25, 1950? A. I did.

(Testimony of Eugene M. Foley.)

Q. Where did that meeting take place?

A. At the Sainte Claire Hotel.

Q. Who was present at the meeting?

A. Mr. Kihs, Mr. Lazzaro, Mr. McLoughlin, myself.

Q. What was the purpose of the meeting, Mr. Foley?

A. Well, in short, to break ice. Mr. McLoughlin—I had heard from the store that Mr. McLoughlin or Mr. Lazzaro, or both, had made a claim of representation of the people in the San Jose store, which is standard company procedure when a claim of [234] representation is made, the claim is transmitted to the company's personnel department which in turn sends it to me. At that time I had negotiations pending elsewhere and communications passed between Mr. McLoughlin and myself and as a result of those communications we met on the 25th of January, and, as I say, it was an ice-breaking session. The claim was made—naturally, I wanted to put my best foot forward—I told them how good we were in not influencing the people one way or the other. We talked about, and I did this in order that there would be no misunderstanding later, I told them I had firm convictions against a union shop. I might say parenthetically that I knew the union shop existed in the Kress store because they inquired before I left New York who had the contract with this Union—and I might say I re-

(Testimony of Eugene M. Foley.)

ceived the contract with the Kress Company before I left New York.

So that, to understand one another from the outset, I said, "We don't look favorably at all on union shops," and I said particularly there was a union shop clause in the Kress agreement.

We talked about an election. I said, "I have the invariable practice of referring claims of representation to the Labor Board." Mr. McLoughlin, particularly, told me about some experiences he had with the Board, matters of delay; he wasn't very affectionate toward the personnel either, of the Board, and suggested that the matter of representation be settled by some State agency and I, being somewhat ignorant of procedure here, was opposed to [235] sidestepping the Board, an agency set up by the Government for the very purpose of determining whether a union represented the employees or not of the store.

* * *

Trial Examiner Spencer: Have you finished, Mr. Foley, on this meeting?

The Witness: Well, no; I heard Mr. McLoughlin say, during the course of the meeting, the words "consent election," and his mind, or mine, leaped to some other subject, and that was the last I heard of consent election. I never said, yes, no, nor did I mention those words at all at this meeting of January 25th. [236]

Q. (By Mr. Hofvendahl): I take it from your previous testimony, Mr. Foley, you did not refuse

(Testimony of Eugene M. Foley.)

to discuss the question of representation with Mr. McLoughlin and Mr. Lazzaro?

A. Oh, no—refused to discuss it? Oh, no, we had a very cordial meeting. We had a nice talk and we talked about a union shop, as a matter of fact. I told them that I had listened to arguments in twenty or more negotiations on the union shop, and I never heard a good argument for it yet. But after it was all over—in fact, the only belligerent word uttered by Mr. McLoughlin was, “Well, we’ll never go for that.”

Mr. McTernan: Object, as a conclusion of the witness that it was belligerent.

Trial Examiner Spencer: All right, we will strike the word “belligerent.”

Q. (By Mr. Hofvendahl): Did you state, on the occasion of this meeting, Mr. Foley, that you would ever refuse to discuss the question of representation with the Union?

A. Well, we were discussing representation; in connection with the representation, I said that I would like to have them go to the Board and have the Board settle the question of representation. All that I was interested in was laying the ground work [237] for a bargaining if they did find that they represented a majority of the employees.

Q. Then did you return to this area after January 25, 1950, on May 3, 1950?

A. Yes, and as a matter of fact, I returned to this area before that; I returned on March 3rd in connection with the representation proceeding in San Francisco, and after that representation hear-

(Testimony of Eugene M. Foley.)

ing, well, we ironed out certain little wrinkles in connection with the unit, and the Board ordered an election, directed an election to be held within 30 days after April 4th. [238]

* * *

Q. (By Mr. Hofvendahl): What was your purpose in coming to this community on May 2nd, 1950, then?

A. Well, I wanted to be here if the Union was chosen as the bargaining agent, I wanted to be here to bargain.

* * *

Cross-Examination

By Mr. Kennedy: [239]

* * *

Q. Now, in the copy of the Kress contract that you secured, Mr. Foley, it is true, is it not, that included [241] in that copy of the contract there were wage rates? A. Yes, sir.

Q. And you know, as a matter of fact, that the wage increases that were granted in February brought the Grant employees to substantially the same level as the Kress employees with respect to wage rates? A. No, I don't know. [242]

* * *

Trial Examiner Spencer: Now, Mr. Kennedy, you are not contending that in order to show good faith an employer is required to enter into a consent election, are you?

Mr. Kennedy: I am contending that if there are no——

Trial Examiner Spencer: If he is intended to, that is not a consent election; that would simply be a contradiction of [260] terms. [261]

* * *

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

W. T. GRANT COMPANY,
Respondent.

CERTIFICATE OF THE
NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board by its Executive Secretary, duly authorized by Section 102.87, Rules and Regulations of the National Labor Relations Board—Series 6, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, entitled, “In the Matter of W. T. Grant Company and Retail Clerks Union, Local 428, the same being known as Case No. 20-CA-378 before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceedings was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Order designating William E. Spencer Trial Examiner for the National Labor Relations Board dated October 18, 1950.

2. Stenographic transcript of testimony taken before Trial Examiner William E. Spencer on November 13 and 14, 1950, inclusive, together with all exhibits introduced in evidence.

3. Copy of Trial Examiner William E. Spencer's Intermediate Report dated November 30, 1950 (annexed to item 9 hereof; order transferring case to the Board dated November 30, 1950, together with affidavit of service and United States Post Office return receipts thereof.

4. Respondent's Motion For Order Correcting Transcript of Testimony dated December 4, 1950. (Granted, see Board's Decision and Order dated June 7, 1951, page 1 footnote 2.)

5. Respondent's letter dated December 5, 1950, requesting permission to argue orally before the Board. (Denied, see Board's Decision and Order dated June 7, 1951, page 1 footnote 2.)

6. Respondent's letter dated December 7, 1950, requesting extension of time to file exceptions and briefs.

7. Copy of Board's telegram dated December 8, 1950, granting all parties extension of time to file exceptions and briefs.

8. Respondent's Exceptions to Intermediate Report received January 5, 1951.

9. Copy of Decision and Order issued by the National Labor Relations Board on June 7, 1951, with Intermediate Report annexed, together with

affidavit of service and United States Post Office return receipts thereof.

10. Respondent's Motion to Reconsider Board's Decision and Order dated June 21, 1951.

11. Union's telegram, dated June 26, 1951, in opposition to Respondent's Motion for Reconsideration.

12. Board's Order Denying Motion to Reconsider Decision and Order dated July 11, 1951, together with affidavit of service and Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 9 day of October, 1951.

/s/ FRANK M. KLEILER,

Executive Secretary,

[Seal]

NATIONAL LABOR

RELATIONS BOARD.

[Endorsed]: No. 13133. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. W. T. Grant Company, a Corporation, Respondent. Transcript of Record. Petition for Enforcement of An Order of the National Labor Relations Board.

Filed October 15, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of Court of Appeals and Cause.]

DESIGNATION OF THE NATIONAL LABOR
RELATIONS BOARD OF THOSE PARTS
OF THE RECORD WHICH THE BOARD
DESIRES TO HAVE PRINTED

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

Comes now the National Labor Relations Board, the petitioner herein, and, in conformity with Rule 19 (6) of this Court, designates the following portions of the record to be printed in support of the Board's petition:

1. The Charge, dated May 2, 1950 (General Counsel Exh. 1).

2. The First Amended Charge, dated August 9, 1950 (General Counsel Exh. 5).

3. The Complaint (General Counsel Exh. 6).

4. The Answer (General Counsel Exh. 9).

5. The following pages from the stenographic transcript of the hearing before the Trial Examiner:

* * *

6. The following General Counsel Exhibits: 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 43, 47, 50, 51, 52, (Title page and page 25, lines 16-23), 53, 56, 58.

7. Respondent Exhibit 2.

8. Exceptions of Respondent to Intermediate Report.

9. Board's Decision and Order, together with Intermediate Report of the Trial Examiner attached thereto.

10. Respondent's Motion for Reconsideration, dated June 21, 1951.

11. Order denying Motion for Reconsideration.

12. The petition for enforcement and any response filed thereto.

13. Certificate of Contents of Record.

14. This Designation of Record.

Dated at Washington, D. C., this 9 day of October, 1951.

/s/ A. NORMAN SOMERS,

Assistant General Counsel,
National Labor Relations
Board.

[Endorsed]: Filed Oct. 15, 1951.

[Title of Court of Appeals and Cause.]

PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR
RELATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant

to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. IV, Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, W. T. Grant Company, San Jose, California, its officers, agents, successors and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of W. T. Grant Company and Retail Clerks Union, Local 428, A.F.L., Case No. 20-CA-378."

In support of this petition the Board respectfully shows:

(1) The Respondent is a Delaware Corporation engaged in business in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon all proceedings had in said matter before the Board as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board on June 7, 1951, duly stated its findings of fact and conclusions of law, and issued an order directed to the Respondent, its officers, agents, successors, and assigns.

The aforesaid order provides as follows:

ORDER

Upon the entire record in the case and pursuant to Section 10 (c) of the National Labor

Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent W. T. Grant Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Retail Clerks Union, Local 428, AFL, as the exclusive representative of all employees at its San Jose, California, store, excluding supervisors, with respect to rates of pay, wages, hours of employment, or other conditions of employment.

(b) Conferring benefits on its employees for the purpose of inducing them to refrain from union affiliation and activities; questioning its employees concerning their union activities; threatening to close its San Jose store rather than accede to a union shop; or in any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Retail Clerks Union, Local 428, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a

condition of employment, as authorized in Section 8 (a) (3) the National Labor Relations Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Retail Clerks Union, Local 428, AFL, as the exclusive representative of all the aforesaid employees with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its San Jose, California, store, copies of the notice attached hereto, marked Appendix A.¹⁰ Copies of the said notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by the Respondent's representative, be posted by Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to in-

¹⁰In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted in the notice before the words: "A Decision and Order," the words: "A Decree of the United States Court of Appeals Enforcing."

sure that such notices are not altered, defaced, or covered by other material.

(c) Notify the Regional Director for the Twentieth Region in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

(3) On June 7, 1951, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's Counsel.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring Respondent, its officers, agents, successors, and assigns to comply therewith.

Dated at Washington, D. C., this 9th day of October, 1951.

NATIONAL LABOR
RELATIONS BOARD,
By /s/ A. NORMAN SOMERS,
Assistant General Counsel.

Appendix A

Notice to All Employees
Pursuant to
A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not confer benefits upon our employees for the purpose of inducing them to refrain from union affiliation and activities.

We Will Not question our employees concerning their union activities, or threaten to close our San Jose store rather than accede to a union shop.

We Will Not in any other manner interfere with, restrain or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Retail Clerks Union, Local 428, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for

the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such right may be affected by an agreement which requires membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

We Will Bargain collectively upon request with the above-named union as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, wages, hours of employment and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All employees of our San Jose store, excluding supervisors, as defined by the Act.

All of our employees are free to become, remain or refrain from becoming or remaining members of Retail Clerks Union, Local 428, AFL, or any other labor organization, except to the extent that their right may be affected by a lawful agreement which requires membership as a condition of employment.

Dated

W. T. GRANT COMPANY,

(Employer)

By /s/,

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Endorsed]: Filed Oct. 15, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
PETITIONER INTENDS TO RELY

Comes now the National Labor Relations Board, the petitioner herein, and, in conformity with Rule 19 (6) of this Court, states that it intends to rely upon the following points in this proceeding:

1. Substantial evidence on the record considered as a whole supports the Board's findings that respondent violated Section 8 (a) (1) of the Act by unilaterally granting wage and hour benefits to its employees to discourage union affiliation, by interrogating its employees in respect of their union activities, and by threatening to close its San Jose store rather than accede to a union shop.

2. Substantial evidence on the record considered as a whole supports the Board's finding that respondent refused to bargain with the Union, in violation of Section 8 (a) (5) of the Act.

Dated at Washington, D. C., this 9th day of October, 1951.

/s/ A. NORMAN SOMERS,
Assistant General Counsel, National Labor Relations Board.

[Endorsed]: Filed Oct. 15, 1951.

[Title of Court of Appeals and Cause.]

ORDER TO SHOW CAUSE

The President of the United States of America

To W. T. Grant Company, 146 South First Street,
San Jose, California, and Retail Clerks Union,
Local 428, AFL, Att.: Messrs. Victor Lazzaro
and James P. McLoughlin, 84 South First St.,
San Jose, California.

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10(e)), you and each of you are hereby notified that on the 15th day of October, 1951, a petition of the National Labor Relations Board for enforcement of its order entered on June 7, 1951, in a proceeding known upon the records of the said Board as "In the Matter of W. T. Grant Company and Retail Clerks Union, Local 428, AFL, Case No. 20-CA-378," and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief

Justice of the United States, this 15th day of October, in the year of our Lord one thousand, nine hundred and fifty-one.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

Returns on Service attached.

[Endorsed]: Filed Oct. 22, 1951.

[Title of District Court and Cause.]

ANSWER TO THE PETITION OF THE
NATIONAL LABOR RELATIONS BOARD
FOR THE ENFORCEMENT OF ITS
ORDER

To the Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

Comes now W. T. Grant Company, the respondent herein, and, answering the petition of the National Labor Relations Board:

1. Admits that it is a Delaware corporation, and further, that this Court has jurisdiction of the Board's petition, but it denies that any unfair labor practices were committed by the Respondent herein at any time or place.

2. Admits that the Board on June 7, 1951, duly stated its findings of fact and conclusions of law and issued an order directed to the Respondent, its

officers, agents, successors and assigns, but it alleges that such findings of fact are not supported by substantial evidence and that the Board's conclusions are contrary to law.

3. Admits due service of the Board's Decision and Order.

4. Denies knowledge or information as to the truth of any of the averments in the fourth paragraph of the Board's petition.

Wherefore, the Respondent prays this Honorable Court to set aside in its entirety the order of the National Labor Relations Board.

W. T. GRANT COMPANY,
By /s/ EUGENE M. FOLEY,
Attorney.

Dated at New York, N. Y., this 23rd day of October, 1951.

[Endorsed]: Filed Oct. 26, 1951.

No. 13133

United States
Court of Appeals
for the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

W. T. GRANT COMPANY, a Corporation,
Respondent.

Supplemental
Transcript of Record

Petition for Enforcement of an Order of the
National Labor Relations Board

FILED

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No. 13133

United States
Court of Appeals
for the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

W. T. GRANT COMPANY, a Corporation,
Respondent.

Supplemental
Transcript of Record

Petition for Enforcement of an Order of the
National Labor Relations Board

NAMES AND ADDRESSES OF ATTORNEYS

EUGENE K. KENNEDY, ESQ.,

San Francisco, California,

Appearing on Behalf of the General
Counsel.

FRANCIS J. McTERNAN, ESQ.,

57 Post Street,

San Francisco, California,

Appearing on Behalf of Charging Party,
Retail Clerks Union, Local 428, AFL.

EUGENE M. FOLEY, ESQ.,

1441 Broadway,

New York, New York,

Appearing on Behalf of Respondent.

JAMES P. McLOUGHLIN, and

VICTOR LAZZARO,

84 S. First Street,

San Jose, California,

Appearing for Local 428, AFL.

1. The first part of the paper is devoted to a general discussion of the problem.

2. The second part is devoted to a detailed study of the case of a single particle.

3. The third part is devoted to a study of the case of a system of particles.

4. The fourth part is devoted to a study of the case of a system of particles.

GENERAL COUNSEL'S EXHIBIT No. 52

Official Report of Proceedings
Before the
National Labor Relations Board
Case No. 20-RC-780

In the Matter of:

W. T. GRANT COMPANY

and

RETAIL CLERKS UNION, LOCAL 428, Affiliated
With RETAIL CLERKS INTERNATIONAL
ASSOCIATION, A. F. of L.

Place: San Francisco, California.

Date: March 3, 1950.

* * *

VICTOR J. LAZZARO

Cross-Examination

By Mr. Foley:

Q. Mr. Lazzaro, you said that Mr. Foley said in his nice way. Was there any friction at this meeting at all?

The Witness: Must I answer, Mr. Examiner?

Hearing Officer Berke: I haven't heard any objection. If there is any objection——

Mr. McTernan: No, I have no objection to it.

A. None whatever, sir.

Q. (By Mr. Foley): All harmonious, Mr. Lazzaro?
A. Yes, sir.

(Testimony of Victor J. Lazzaro.)

Q. We respected one another's views and opinions?

A. Yes, sir, as dignified gentlemen. [15*]

* * *

Q. Well, I refer specifically to Mr. McLoughlin's thoughts as expressed when I suggested that he go to the Labor Board?

A. I can't testify as to his thoughts.

Q. I don't want you to, I don't even want you to testify as to what he said, but did he not say that, oh, well, since we had, or, in effect, "Since we have to go to the Board, I would like to think that over a time." Didn't he say that? [18]

A. I don't remember that, sir. I am sure that we did say that we were surprised that the Company would take the attitude that it was necessary to go to the Board, since we had sufficient representation cards that could easily have been cross-checked against the pay roll. I believe we practically insisted that we don't have an election, since it takes so much time and so much nonsensical procedure. That is our feeling, sir; has been. [19]

* * *

Hearing Officer Berke: Well, before we dismiss the witness, is it going to be possible to stipulate with respect to the appropriate unit? Let's go off the record on this.

(Discussion off the record.)

Hearing Officer Berke: On the record.

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Victor J. Lazzaro.)

Mr. Foley: My objection is only to one word in this unit, that is the word "trainees." We have no classification such as trainees. I should like to substitute the word "floorman" there. We have two people who are loosely referred to as trainees in the store, one is the Assistant Manager, who is specifically named, and the other is not specifically named, and I should just like to substitute the word "floorman." [22]

* * *

Hearing Officer Berke: Well, exactly what is a floorman and what he does?

Mr. Foley: Is one who is employed by the Personnel Department in the Company's executive offices in New York, is in training for store management, is subject to transfer for training under various store managers, and while at work at any store, is assigned a certain part of the store, assigned to a certain part of the store and may effectively recommend the hiring, firing, and promotion of people working there in that particular store, or part of the store.

Mr. McTernan: So stipulated for the [23] Union.

* * *

Mr. Foley: I wish you would let me go on the record, though. I would like to——

Hearing Officer Berke: We are on the record.

Mr. Foley: I would like to say here that during Mr. Lazzaro's testimony, he referred to a store operation manual in which the Grant Company's

(Testimony of Victor J. Lazzaro.)

labor policy is set forth. The Grant Company has a uniform policy. It is not flexible. We believe in every case that all people working in the store, excepting store manager, assistant store manager and floorman, should be included in the unit. We don't believe that office people should be ever excluded from the unit, and we do not take a flexible position that where the union wants them in, we want them out, or where the union wants them out, we want them in. We want them in all the time. And I am saying that particularly in view of the Moss decision in 88 NLRB. [24]

* * *

Mr. McTernan: Do I understand that the Board rules do not provide for time to answer any briefs that are filed?

Hearing Officer Berke: That is correct. We don't have that procedure of answering a brief after it comes in. Now, within the time that is allowed you under the rule, you may ask for additional time from the Hearing Officer, or you may request the Board for additional time, but you have got to make that request within the time normally allowed.

Mr. McTernan: Well, in that case, I will request the time, the additional two weeks.

Hearing Officer Berke: All right. You may have the same time that Mr. Foley has.

Mr. McTernan: Yes. And I might state if I get Mr. Foley's brief without that three weeks, I am going to make an additional request to the Board

(Testimony of Victor J. Lazzaro.)

for additional time to answer anything that he files.

Hearing Officer Berke: Well, of course, that is a matter that is up to you and the Board.

Mr. Foley: There won't be any occasion for Mr. McTernan to answer anything that I might say. My sole purpose is, I represent a national organization, and I want to go on record in Washington as having a record of consistency, trusting that when any occasion arises where a suggestion is made that we deviate from a consistent policy, that the [30] Board will consider the fact that we acted consistently throughout all our labor relations matters. That is all I am concerned with.

Mr McTernan: Well, I might want to answer that. [31]

* * *

Received in evidence November 13, 1950.

[Endorsed]: No. 13133. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. W. T. Grant Company, a Corporation, Respondent. Supplemental Transcript of Record. Petition for Enforcement of an Order of the National Labor Relations Board.

Filed October 15, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 13133

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

W. T. GRANT COMPANY, RESPONDENT

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

GEORGE J. BOTT,

General Counsel,

DAVID P. FINDLING,

Associate General Counsel,

A. NORMAN SOMERS,

Assistant General Counsel,

MARCEL MALLET-PREVOST,

IRVING M. HERMAN,

Attorneys,

National Labor Relations Board.

FILED

FEB - 4 1952

PAUL P. O'BRIEN

CLERK

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 13133

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

W. T. GRANT COMPANY, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, Secs. 151 *et seq.*),¹ for enforcement of its order (R. 27-29, 32-33)² issued on June 7, 1951, against

¹ The pertinent provisions of the Act are appended hereto (pp. 26-30, *infra*).

² References to portions of the printed record are designated "R." Wherever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence. The Board's decision adopted the findings and conclusions of the trial examiner with certain modifications and additions (R. 22-23).

respondent, W. T. Grant Company, following the usual proceedings under Section 10 of the Act. This Court has jurisdiction under Section 10 (e) of the Act, the unfair labor practices having occurred at San Jose, California, within this judicial circuit.³

STATEMENT OF THE CASE

I

The Board's findings of fact

This case concerns (a) respondent's refusal to bargain with Retail Clerks Union, Local 428, AFL, herein called the Union, after it had been designated as their bargaining representative by a majority of respondent's employees; (b) respondent's efforts to avoid its bargaining obligation by dissipating the Union's majority; and (c) respondent's threat to close its store rather than bargain with the Union concerning a union-shop agreement.

A. The Union's selection as bargaining representative of respondent's employees

There is no dispute as to the propriety of the Board's finding that the bargaining unit here consists of all employees at respondent's San Jose store

³ Respondent, a Delaware corporation, with executive offices in New York, operates approximately 495 retail stores located in 39 States. During the fiscal year ending January 31, 1950, respondent purchased for sale at its San Jose, California store, involved herein, merchandise valued in excess of \$100,000, approximately 90 percent of which was shipped to said store from points outside California. Respondent concedes that it is engaged in commerce within the meaning of the Act (R. 36; 9, 13, 65-66). No question of the Board's jurisdiction is presented.

excluding supervisors (R. 36-37; 10, 13). With respect to the Union's majority, the Board found, upon substantial evidence, that of the 39 employees in this unit during the workweek ending January 25, 1950 (R. 148-149), 20 had designated the Union as their bargaining representative between January 4 and January 6, 1950 (R. 23; 79-94, 96-99).⁴

B. Respondent's refusal to recognize the Union without Board certification based upon a formal hearing

On January 6, 1950, Kihs, the manager of respondent's San Jose store (R. 37; 152), received from the Union a written request for a bargaining conference (R. 37; 70-71, 169-170). Kihs forwarded the Union's request to Foley, respondent's attorney in New York, who advised the Union that he would arrange a meeting shortly thereafter, which he did (R. 71-72). The meeting was held on January 25 and was attended by Kihs and Foley on behalf of respondent, and by McLoughlin and Lazzaro, secretary-treasurer and business representative, respectively, of the Union (R. 23, 37; 69, 99-100, 112, 114).

McLoughlin proposed that respondent check the Union's authorization cards or employ "any other quick procedure" for ascertaining the Union's majority status, but Foley, adhering to respondent's policy

⁴ An additional employee had signed an authorization card for the Union (R. 95), but apparently left respondent's employ before January 25. The trial examiner appears erroneously to have included this employee in arriving at his figure of 21 employees who designated the Union as bargaining agent (R. 37). The trial examiner also inadvertently numbered the working force in the unit at 40 (R. 37).

of requiring a Board election before granting a union's request for bargaining, suggested that the Union file a representation petition with the Board (R. 23, 38; 100-102, 115-116). Accordingly, the Union filed such a petition on January 31 (R. 38; 103, 121-127). Respondent further insisted upon a formal hearing on the petition and refused the Union's request that it consent to an immediate election, notwithstanding the absence of any real issue other than the one to be determined by the election itself (R. 38-39; 69-70, 73-74, 76-78, 108, 117, 120, 121-127).⁵

C. Respondent's campaign to dissipate the Union's majority while the petition for certification was pending

Early in February, Manager Kihs, without consulting or notifying the Union, called a meeting of the employees in the store and announced that respondent would grant certain merit wage increases to 23 of the employees and that 13 employees would have their workweek changed from 6 days to 5 days, a change generally favored by the employees (R. 23-24, 39; 108-109, 137, 141-142, 143-144, 152-154, 156).⁶ These benefits, together with 8 promotions, with respect to which respondent had also failed to consult the Union, became effective during the workweek ending Febru-

⁵ The hearing was held on March 3, and on April 4 the Board issued its order directing the holding of an election (R. 39; 103-107, 121). The election was scheduled for May 3 (R. 39; 110). It was never held, however, because prior to the scheduled date the Union withdrew its petition and filed the unfair labor practice charge herein (R. 39; 108).

⁶ At the same time, according to uncontradicted testimony, Kihs told the employees that they did not have to join the Union (R. 141-142, 144).

ary 23 (R. 23-24, 39; 142, 143-144, 146, 152-154). Kihs had never before granted so many wage increases at one time; indeed he could not recall any prior occasion when such increases had been granted on a group basis (R. 39-40; 155-156). Nor did Kihs offer any explanation for his concurrent action in reducing the number of workdays of the 13 employees, although he testified that one of the employees had requested such a change (R. 41; 156-157). The Board affirmed the trial examiner's finding that the bestowal of these benefits had the purpose of discouraging Union affiliation by respondent's employees (R. 23-24, 42).

In March, Employee Putney, who was wearing a Union button while at work, was asked by Mrs. Kleidon, assistant manager of the store (R. 50; 143), whether she was the only girl in the store who belonged to the Union (R. 50; 144). Putney thereupon removed the button (R. 50; 145). In April, Kleidon asked Employee Nix why she still wore her Union button, and Nix thereafter wore the button "on the underneath side" of her sweater (R. 50; 150-151).

D. Respondent's further interference, restraint and coercion

On February 11, respondent posted a notice in the San Jose store advising its employees that the Company's open shop policy "will not be changed" (R. 24, 42-43; 138-139). Late in April and on May 1, Manager Kihs showed to numerous employees a letter from respondent's attorney, dated April 27, and written in reply to an inquiry by Kihs relating to the union shop problem. The attorney stated his

belief that it had been “settled Company policy that we will not operate a union shop in San Jose or elsewhere,” but added that “in order to make assurance doubly sure” he had cleared the matter with a Company official and found that “we can take a definite position to the effect that we will not agree to a union shop under any circumstances,” and that “if we can’t do business in San Jose on an open shop basis, we just won’t do business in San Jose” (R. 24-25, 43-44; 138, 140-141, 145-146).⁷

II

The Board’s conclusions of law

Upon the above findings, the Board concluded that respondent had engaged in unfair labor practices contravening Sections 8 (a) (1) and (5) of the Act. In thus affirming the trial examiner, the Board unanimously held that respondent’s interrogation of its employees concerning union membership and its unilateral grant of benefits to its employees with the intent to discourage union membership interfered with, restrained and coerced the employees in the exercise of their rights under Section 7 of the Act, thereby violating Section 8 (a) (1) (R. 23-24, 42, 51). The Board also unanimously concluded, in view of these unfair labor practices, that “Respondent’s insistence upon a Board election was not motivated by a good faith doubt concerning the Union’s majority

⁷ One employee construed the letter as a threat to close the store rather than permit unionization of the employees (R. 48; 138). Another employee appears to have construed the letter as a threat to maintain a closed nonunion shop (R. 146).

status, but rather by a desire to gain time to undermine the Union and destroy its majority," and that therefore respondent's refusal to bargain with the Union since January 25, 1950, violated Section 8 (a) (5) of the Act (R. 23-24, 52-53). The Board also found that respondent's unilateral grant of benefits constituted an independent violation of Section 8 (a) (5) of the Act even without regard to respondent's purpose (R. 24, n. 4).

Finally, the Board, one member dissenting, affirmed the trial examiner's conclusion that under all of the circumstances, the notice of February 11 and the subsequent letter, embodying a threat to close the store rather than accede to a union shop, evinced a fixed determination not to bargain with respect to a subject of compulsory bargaining and coerced the employees in the exercise of their rights under Section 7, in violation of Section 8 (a) (1) of the Act (R. 24-26, 46-49).

III

The Board's order

The Board directed respondent to cease and desist from refusing to bargain with the Union; from conferring benefits on its employees for the purpose of inducing them to refrain from union affiliation and activities; from interrogating its employees concerning their union activities; from threatening to close its San Jose store rather than accede to a union shop; and from in any other manner interfering with, restraining and coercing its employees in the exercise

of their rights under Section 7 of the Act. It affirmatively directed respondent to bargain with the Union upon request, and to post appropriate notices (R. 27-29, 32-33).

SUMMARY OF ARGUMENT

The Board's findings that respondent interfered with and coerced its employees, in violation of Section 8 (a) (1) of the Act, by unilaterally conferring benefits on them and interrogating them with respect to union membership are supported by substantial evidence on the record considered as a whole. This evidence, including the timing and unprecedented nature of respondent's action, without satisfactory explanation therefor, shows that the action was designed to discourage membership in the Union.

Substantial evidence supports the Board's finding that respondent violated its bargaining obligation by refusing to recognize the Union on January 25 without a Board election. This refusal was not motivated by a genuine doubt of the majority status, which the Union in fact enjoyed, but by a desire to gain time to undermine the Union and destroy its majority. Moreover, the unilateral grant of benefits constituted an independent violation of Section 8 (a) (5) even without regard to motive.

The Board properly found that respondent violated Section 8 (a) (1) by threatening to move its business elsewhere rather than accede to a union shop. Such threat tended to undermine the confidence of the employees in the Union and to discourage membership therein. The fact that the employees had not voted to authorize a union shop at the time of the threat, in

accordance with the then current provisions of Sections 8 (a) (3) and 9 (e) of the Act, is immaterial to the question whether the employees were coerced thereby. The threat not only made a fair referendum impossible, but foreclosed future bargaining on the subject of a union shop under any circumstances.

ARGUMENT

I

Substantial evidence on the record considered as a whole supports the Board's findings that respondent interfered with, restrained and coerced its employees in violation of Section 8 (a) (1) of the Act by interrogating them with respect to their union affiliation and by unilaterally conferring benefits on them for the purpose of discouraging such affiliation

The Board's finding that respondent's grant of wage and hour benefits (pp. 4-5, *supra*) was designed to discourage the union affiliation of its employees is amply supported by the whole record. As has been shown, these benefits were announced approximately one month after the Union's request for recognition as bargaining agent, and within two weeks after the Union, upon respondent's refusal to recognize it without a Board election, had filed its petition for certification with the Board. Thus, the benefits came hard upon the heels of the Union's successful organizing campaign, and at a "crucial time" when a shift in employee attitude could still avert the need to bargain with the Union. Cf. *Joy Silk Mills, Inc. v. N. L. R. B.*, 185 F. 2d 732, 739, 742 (C. A. D. C.), certiorari denied, 341 U. S. 914; *N. L. R. B. v. Ellis-Klatscher & Co.*, 142 F. 2d 356, 358-359 (C. A. 9); *N. L. R. B. v. Jahn & Ollier Engraving Co.*, 123 F. 2d

589, 593 (C. A. 7). On these facts alone the Board was warranted in attributing the granting of the benefits to more than mere coincidence. In addition to the convenient timing of the benefits, however, the record shows that the widespread scale on which they were awarded was entirely unprecedented, that respondent had no explanation for reducing the number of workdays, and that respondent, demonstrating its hostility to the Union, followed up this action with unlawful interrogation of its employees concerning their union membership (*supra*, p. 5).⁸

In the circumstances the Board had every reason for rejecting respondent's claim that the purpose of the wage increases was only to reach its competitors' wage level (R. 23-24, 39-42). Promises of economic benefits unilaterally made prior to an election, even when unaccompanied by other unfair labor practices, have been held sufficient to warrant an inference by the Board that the employer's action was taken for the purpose of discouraging employees' interest and activity in the union. *N. L. R. B. v. Bailey Co.*, 180 F. 2d 278, 279-280 (C. A. 6). Actual granting of unilateral wage and hour benefits "suddenly and without explanation" (R. 40-41) during a union's organization campaign indicates a purpose to interfere with the employees in the exercise of

⁸ Not without significance was respondent's use of the occasion on which the benefits were announced for the purpose of advising the employees that it was not necessary for them to join the Union (R. 141-142, 144). *N. L. R. B. v. Chicago Apparatus Co.*, 116 F. 2d 753, 756-757 (C. A. 7); cf. *Joy Silk Mills, Inc. v. N. L. R. B.*, 185 F. 2d 732, 739 (C. A. D. C.), certiorari denied, 341 U. S. 914.

their rights under Section 7 of the Act, especially when it occurs in a context of other antiunion activity (*F. W. Woolworth Co. v. N. L. R. B.*, 121 F. 2d 658, 660 (C. A. 2), and hence “bears no shield of privilege” (*Joy Silk Mills, Inc., v. N. L. R. B.*, 185 F. 2d 732, 736–737, 739, 742 (C. A. D. C.) certiorari denied, 341 U. S. 914).⁹ As this Court stated in a related situation, respondent’s conduct “would naturally weaken the position of the Union in any further bargaining for a collective agreement * * *; the [respondent] could * * * reasonably anticipate that [its action] would * * * make the Union ‘lose face’ with its members.” *N. L. R. B. v. Grower-Shipper Vegetable Ass’n*, 122 F. 2d 368, 377.

The Board properly found (R. 24) that respondent’s interrogation of Employees Putney and Nix concerning the union membership of its employees, while the employees were awaiting the opportunity to register their choice by secret ballot (*supra*, pp. 4, 5), was equally violative of Section 8 (a) (1) of the Act and indicative of respondent’s purpose to debilitate the Union. *H. J. Heinz Co. v. N. L. R. B.*, 311 U. S. 514, 518; *N. L. R. B. v. Bradford Dyeing Ass’n*, 310 U. S. 318, 327; *N. L. R. B. v. Holtville Ice and Cold Storage Co.*, 148 F. 2d 168, 169 (C. A. 9); *N. L. R. B. v. Lettie Lee, Inc.*, 140 F. 2d 243, 245 (C. A. 9); *N. L. R. B. v. Security Warehouse & Cold Storage*

⁹ Accord, *N. L. R. B. v. Lettie Lee, Inc.*, 140 F. 2d 243, 245 (C. A. 9); *Idaho Potato Growers v. N. L. R. B.*, 144 F. 2d 295, 310 (C. A. 9), certiorari denied, 323 U. S. 769; *N. L. R. B. v. Wytheville Knitting Co.*, 175 F. 2d 238, 239 (C. A. 3); *N. L. R. B. v. Winona Textile Mills, Inc.*, 160 F. 2d 201, 207 (C. A. 8).

Co., 136 F. 2d 829, 833 (C. A. 9); *N. L. R. B. v. J. G. Boswell Co.*, 136 F. 2d 585, 590 (C. A. 9); *N. L. R. B. v. National Plastic Products Co.*, 175 F. 2d 755, 760 (C. A. 4).

Contrary to respondent's contention, "the aroma of coercion" generated by such interrogation (*Joy Silk Mills, Inc. v. N. L. R. B.*, 185 F. 2d 732, 743 (C. A. D. C.), certiorari denied, 341 U. S. 914) is not dissipated by the allegedly "friendly" manner of the interrogators. *N. L. R. B. v. William Davies Co.*, 135 F. 2d 179, 181 (C. A. 7), certiorari denied, 320 U. S. 770. It is "not necessary to show duress but only interference, and it is not necessary that the interference shall be successful in preventing organization." *Rapid Roller Co. v. N. L. R. B.*, 126 F. 2d 452, 457 (C. A. 7), certiorari denied, 317 U. S. 650.¹⁰ In any event, the fact that the employees questioned forthwith removed their union buttons (*supra*, p. 5) furnishes potent evidence that they were in fact coerced, and thus graphically supports the Board's position that "The employee who is interrogated concerning matters which are his sole concern is reasonably led to believe that his employer not only wants information on the nature and extent of his union activities, but also contemplates some form of reprisal once this information

¹⁰ Accord, *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, 588; *N. L. R. B. v. Donnelly Garment Co.*, 330 U. S. 219, 231; *Joy Silk Mills, Inc. v. N. L. R. B.*, 185 F. 2d 732, 743-744 (C. A. D. C.), certiorari denied, 341 U. S. 914; cf. *N. L. R. B. v. Walt Disney Productions*, 146 F. 2d 44, 49 (C. A. 9), certiorari denied, 324 U. S. 877; *N. L. R. B. v. J. G. Boswell Co.*, 136 F. 2d 585, 595-596 (C. A. 9); *N. L. R. B. v. Grower-Shipper Vegetable Ass'n*, 122 F. 2d 368, 376 (C. A. 9).

is obtained." *Standard-Coosa-Thatcher*, 85 NLRB 1358, 1361, cited with approval in the *Joy Silk Mills* case, *supra*, at 743: accord. *N. L. R. B. v. Alco Feed Mills*, 133 F. 2d 419, 421 (C. A. 5).

II

Substantial evidence on the record considered as a whole supports the Board's finding that respondent refused to bargain with the Union, in violation of Section 8 (a) (5) of the Act

Respondent refused to recognize the Union as the employees' bargaining representative unless the Union was certified pursuant to a Board-conducted election (*supra*, pp. 3-4). The facts relating to respondent's interference with and coercion of its employees (Point I, *supra*) support the Board's finding that respondent's insistence upon a Board election was not motivated by a good faith doubt of the Union's majority status, but on the contrary by a desire to gain time to undermine the Union and destroy its majority (R. 23-24, 52-53).

It goes without saying, as the Board acknowledged (R. 23), that an employer may refuse recognition and insist upon an election when motivated by an honest doubt of the union's majority status. But, as was said in *Joy Silk Mills, Inc. v. N. L. R. B.*, 185 F. 2d 732, 741 (C. A. D. C.), certiorari denied, 341 U. S. 914:

When, however, such refusal is due to a desire to gain time and to take action to dissipate the union's majority, the refusal is no longer justifiable and constitutes a violation of the duty to bargain set forth in Section 8 (a) (5) of the Act. [Citing cases.] The Act

provides for election proceedings in order to provide a mechanism whereby an employer acting in good faith may secure a determination of whether or not the union does in fact have a majority and is therefore the appropriate agent with which to bargain. Another purpose is to insure that the employees may freely register their individual choices concerning representation. Certainly it is not one of the purposes of the election provisions to supply an employer with a procedural device by which he may secure the time necessary to defeat efforts toward organization being made by a union.

See also, to the same effect, *N. L. R. B. v. Star Beef Co.*, decided December 17, 1951 (C. A. 1), 29 LRRM 2190, 2194.

We submit that an employer who had a good faith doubt as to a union's majority status would not coerce his employees while the representation question was awaiting resolution by the Board. He would not interrogate the employees concerning their union sympathies, but would permit them freely to express their choice in the pending secret election, particularly when the employer himself had insisted on the election in order to ascertain the desires of the employees. Nor would an employer who had an honest doubt of the union's majority status unilaterally confer favors on the employees pending determination of the question, since the natural tendency of such favors is to wean the employees away from the union "by emphasizing to the employees that there is no necessity for a collective bargaining agent." *May Depart-*

ment Stores Co. v. N. L. R. B., 326 U. S. 376, 385 (*supra*, pp. 9–11).

Any doubt respondent may have entertained concerning the Union's majority status would have been resolved in the representation proceeding then pending before the Board. Respondent's efforts to forestall a fair determination of the question by its coercive interrogation of its employees and by its grant of benefits, that is, by "settling" unilaterally a matter with respect to which the employees had appropriately requested collective bargaining" (*N. L. R. B. v. George P. Pilling & Son Co.*, 119 F. 2d 32, 38 (C. A. 3)), a "matter no longer to be determined unilaterally by the employer" (*Singer Mfg. Co. v. N. L. R. B.*, 119 F. 2d 131, 137 (C. A. 7), certiorari denied, 313 U. S. 595), demonstrate that the question of the Union's majority "was not a moving factor in the difficulties" (*Idaho Potato Growers* case, *supra*, at 307–308), but "merely cloaked a determination not to yield [the Union] bargaining rights under any circumstances" (*N. L. R. B. v. Morris P. Kirk & Son, Inc.*, 151 F. 2d 490, 492 (C. A. 9)).¹¹

Respondent's contention, advanced to the Board, that the Union's majority had been lost by the time

¹¹ See also, *N. L. R. B. v. Crompton-Highland Mills, Inc.*, 337 U. S. 217, 225; *N. L. R. B. v. Andrew Jergens Co.*, 175 F. 2d 130, 136 (C. A. 9), certiorari denied, 338 U. S. 827; *N. L. R. B. v. Ellis-Klatscher & Co.*, 142 F. 2d 356, 358–359 (C. A. 9); *N. L. R. B. v. Lettie Lee, Inc.*, 140 F. 2d 243, 245, 247, 248 (C. A. 9); *Idaho Potato Growers v. N. L. R. B.*, 144 F. 2d 295, 310, 311 (C. A. 9), certiorari denied, 323 U. S. 769.

the benefits were conferred, lacks merit. The contention rests on the alleged revocation by Employee Guillory of her authorization of the Union to represent her. There was no such revocation. The testimony relied on by respondent in this connection shows at most that Guillory refused to join the Union (R. 144, 163). But this had no effect on her prior authorization of the Union "to represent me and, in my behalf, to negotiate all agreements as to Hours of Labor, Wages, and other Employment Conditions" (R. 80). The courts have uniformly recognized that membership is not essential to the designation of a union for collective bargaining purposes under the Act. *Continental Oil Co. v. N. L. R. B.*, 113 F. 2d 473, 480 (C. A. 10), remanded on other grounds, 313 U. S. 212; *Pueblo Gas and Fuel Co. v. N. L. R. B.*, 118 F. 2d 304, 307-308 (C. A. 10); cf. *N. L. R. B. v. Electric Vacuum Cleaner Co.*, 315 U. S. 685, 691-692; *Brotherhood of Ry & S. Clerks v. Virginian Ry. Co.*, 125 F. 2d 853, 855 (C. A. 4); *National Motor Bearing Co.*, 5 NLRB 409, 428, enforced 105 F. 2d 652 (C. A. 9). As the Court stated in the *Continental Oil* case, *supra*: "The instrument indicates clearly a purpose to designate the union as the representative of the employees for the purpose of collective bargaining. * * * And the fact that some of the persons signing it were not members of the union makes no difference. Section 9 (a) * * * does not require that all members of the majority making the selection shall be members of the agency selected. Such a limitation is not to be found

either in the language or fair intendment of the statute.”¹²

The Board also held that respondent's grant of benefits constituted an independent violation of Section 8 (a) (5), even without regard to motive (R. 24). This view is well supported by the cases. It follows from the fact that the employer's obligation under the Act is to bargain with the majority representative exclusively, which thus “exacts ‘the negative duty to treat with no other.’” *Medo Photo Supply Corp. v. N. L. R. B.*, 321 U. S. 678, 683–684, citing *N. L. R. B. v. Jones & Laughlin Corp.*, 301 U. S. 1, 44. Not only does “such unilateral action minimize the influence of organized bargaining” (*May Department Stores Co. v. N. L. R. B.*, 326 U. S. 376, 385), but “it is a violation of the essential principle of collective bargaining” (*Medo, supra*, at 684). “Clearly to bargain

¹² Even if, *arguendo*, Guillory's action were considered a revocation of her authorization of the Union to bargain for her, there is no evidence as to when it occurred other than “during the month of January 1950,” or thereafter (R. 162–163). As this Court has held, a union's majority status “once shown to exist is presumed to continue to exist until the contrary is shown.” *N. L. R. B. v. National Motor Bearing Co.*, 105 F. 2d 652, 660; accord, *N. L. R. B. v. E. C. Atkins & Co.*, 331 U. S. 398, 402; *N. L. R. B. v. Harris-Woodson Co.*, 162 F. 2d 97 (C. A. 4), and cases there cited. Absent more specific evidence, the Board was certainly not required to assume that the revocation, if any, occurred before January 25, the date of respondent's wrongful refusal to bargain. If it occurred thereafter, the revocation could, of course, be attributable to respondent's unfair labor practice and hence would not operate to defeat the Union's majority. *Medo Photo Corp. v. N. L. R. B.*, 321 U. S. 678, 683–684; *Franks Bros. Co. v. N. L. R. B.*, 321 U. S. 702, 704; cf. *N. L. R. B. v. Andrew Jergens Co.*, 175 F. 2d 130, 134–135 (C. A. 9), certiorari denied, 338 U. S. 827.

directly with one's employees is not to bargain with their designated exclusive representative." *N. L. R. B. v. Highland Shoe, Inc.*, 119 F. 2d 218, 221 (C. A. 1). Consequently, where, as here, bargaining has been requested by the exclusive representative, the unilateral action of the employer, dealing directly with the employees, is a refusal to bargain and "a violation of Section 8 (5) of the Act." *N. L. R. B. v. Andrew Jergens Co.*, 175 F. 2d 130, 136 (C. A. 9), certiorari denied, 338 U. S. 827; accord, *N. L. R. B. v. Hoppes Mfg. Co.*, 170 F. 2d 962 (C. A. 6); *N. L. R. B. v. George P. Pilling & Son Co.*, 119 F. 2d 32, 38 (C. A. 3); *Great Southern Trucking Co. v. N. L. R. B.*, 127 F. 2d 180, 186 (C. A. 4), certiorari denied, 317 U. S. 652, and cases there cited.

III

The Board properly found that respondent further interfered with, restrained and coerced its employees, in violation of Section 8 (a) (1) of the Act, by threatening to close its San Jose store rather than accede to a union shop

Respondent first gave notice to its employees that its open shop policy "will not be changed" shortly after it had refused to recognize the Union in late January, and at about the same time as its unilateral announcement of wage and hour benefits for the employees (*supra*, pp. 3-5). Thereafter, and immediately prior to the scheduled election date, Manager Kihs called to the attention of numerous employees the letter in which respondent's attorney stated that "to make assurance doubly sure" he had inquired of a Company official and could reaffirm that it was re-

spondent's "settled * * * policy" and "definite position" that it would never agree to a union shop "under any circumstances" (*supra*, pp. 5-6). Finally, the letter added the open threat that "if we can't do business in San Jose on an open shop basis, we just won't do business in San Jose" (*supra*, p. 6).

The Board correctly found (R. 24) that "by notifying its employees in the way it did that it would never agree to a union shop," respondent "coerced the * * * employees in the exercise of the rights guaranteed by Section 7 of the Act" (R. 26).¹³ Respondent's threat to move the plant rather than agree to a union shop, made in a context of antiunion questioning of employees and unilateral granting of benefits, foreclosed the Union in advance of negotiations¹⁴ from bargaining with respect to a matter which the

¹³ The only portion of the Board's order here involved is that part of paragraph 1 (b) which directs respondent to cease and desist from engaging in this specific violation (R. 27). The general "in any other manner" provision of paragraph 1 (b) of the order (R. 27-28) is entitled to enforcement on the basis of the other violations alone. *Medo Photo Supply Corp. v. N. L. R. B.*, 321 U. S. 678, 685-686; *N. L. R. B. v. Grower-Shipper Vegetable Ass'n.* 122 F. 2d 368, 376 (C. A. 9); *N. L. R. B. v. Bailey Co.*, 180 F. 2d 278, 280 (C. A. 6); *N. L. R. B. v. National Plastic Products Co.*, 175 F. 2d 755, 760 (C. A. 4); *N. L. R. B. v. Alco Feed Mills*, 133 F. 2d 419, 421 (C. A. 5).

¹⁴ An employer's foreclosing, in advance of negotiations, possible agreement with respect to one or more of the terms and conditions of employment as to which the Act requires him, upon request, to bargain, is a familiar form of unlawful refusal to bargain. *N. L. R. B. v. Westinghouse Air Brake Co.*, 120 F. 2d 1004, 1005-1006 (C. A. 3); *N. L. R. B. v. Somerset Shoe Co.*, 111 F. 2d 681, 688 (C. A. 1); *N. L. R. B. v. George P. Pilling & Son Co.*, 119 F. 2d 32, 37 (C. A. 3); *N. L. R. B. v. Highland Park Mfg. Co.*, 110 F.

statute gave the Union a right to bargain about.¹⁵ Respondent thus deprived the Union of its right to an opportunity to achieve one of the more important and commonly sought union objectives,¹⁶ and one which the statute specifically permits (Section 8 (a)

2d 632, 637-638 (C. A. 4). It is recognized, moreover, that the effect of such conduct by the employer is "to restrain its employees in the exercise of their rights under Section 7 of the Act." The *Westinghouse* case, *supra*, 120 F. 2d, at pp. 1006-1007). See further reference to the *Westinghouse* case, *infra*, p. 23, n. 19.

¹⁵ It is settled, as this Court has held, that "Union security is properly a 'condition of employment' within the meaning of § 9 (a) of the National Labor Relations Act and hence is within the statutory area of collective bargaining." *N. L. R. B. v. Andrew Jergens Co.*, 175 F. 2d 130, 133, certiorari denied, 338 U. S. 827; accord *N. L. R. B. v. Winona Textile Mills, Inc.*, 160 F. 2d 201, 208 (C. A. 8); *N. L. R. B. v. George P. Pilling & Son Co.*, 119 F. 2d 32, 38 (C. A. 3); *Ritzwoller Co. v. N. L. R. B.*, 114 F. 2d 432, 435, 436 (C. A. 7). Indeed, it has been held illegal as against the policy of the Act for an employer to condition the making of a contract upon a provision that forecloses the employees from bargaining for union security. *N. L. R. B. v. Reed & Prince Mfg. Co.*, 118 F. 2d 874, 882-885 (C. A. 1), certiorari denied, 313 U. S. 595; *N. L. R. B. v. American Mfg. Co.*, 106 F. 2d 61, 66-67 (C. A. 2), affirmed, 309 U. S. 629.

¹⁶ During the fiscal year ending June 30, 1950, union-shop contracts were authorized by the employees in 96.2 percent of the polls conducted by the Board. *Fifteenth Annual Report* of the National Labor Relations Board, p. 14. In the previous year, the comparable figure was 96.7 percent. *Fourteenth Annual Report* of the National Labor Relations Board, p. 6. Because such elections "have almost always resulted in a vote favoring the union shop," thus making the mandatory election procedure of Section 8 (a) (3) (ii) "wholly unnecessary" (S. Rep. No. 646, 82d Congress, 1st Session, p. 1; see H. Rept. No. 1082, 82d Congress, 1st Session, pp. 2-3), the Act has recently been amended by abolishing the requirement for such elections. Pub. Law No. 189, approved October 22, 1951.

(3)). The courts have recognized that this very kind of conduct by an employer would tend to discourage employee support for a union by casting doubt upon its efficacy as bargaining agent. In *N. L. R. B. v. Elkland Leather Co.*, 114 F. 2d 221, 223, 224 (C. A. 3) certiorari denied, 311 U. S. 705, the court held that the employer's statement "issued at the first indication of Union activity," that he would "always operate as an open shop," "'was manifestly designed to discourage organizational efforts.'" To the same effect are *N. L. R. B. v. Harbison-Walker Refractories Co.*, 135 F. 2d 837, 838 (C. A. 8), and *N. L. R. B. v. American Mfg. Co.*, 106 F. 2d 61, 66, 67 (C. A. 2), affirmed, 309 U. S. 629. Cf. *R. R. Donnelley & Sons Co. v. N. L. R. B.*, 156 F. 2d 416, 418, 419 (C. A. 7), certiorari denied, 329 U. S. 810; *N. L. R. B. v. Chicago Apparatus Co.*, 116 F. 2d 753, 756-757 (C. A. 7).¹⁷

Preliminary statements by the employer, made in advance of negotiations, that he will not recognize or bargain at all with the union selected by his employees, as this Court has held, "constitute well recognized forms of interference, restraint and coercion in violation of Section 8 (1) of the Act" (*N. L. R. B. v.*

¹⁷ Even those cases not disposed to hold less emphatic declarations of the open shop policy, unaccompanied by threats, to violate Section 8 (a) (1) *per se*, have held or indicated that such statements were unlawful in a milieu of antiunion activity. *Continental Box Co. v. N. L. R. B.*, 113 F. 2d 93, 94, 96-97 (C. A. 5); *N. L. R. B. v. Blossom Products Corp.*, 121 F. 2d 260, 261 (C. A. 3); *N. L. R. B. v. American Tube Bending Co.*, 134 F. 2d 993, 995 (C. A. 2), certiorari denied, 320 U. S. 768; *N. L. R. B. v. Montgomery Ward & Co.*, 157 F. 2d 486, 499-500 (C. A. 8).

J. G. Boswell Co., 136 F. 2d 585, 590),¹⁸ just as an actual refusal to bargain at all, while going through the motions of negotiating, constitutes an obvious violation of Section 8 (a) (5). (The *Westinghouse* case, *infra*, n. 19, p. 23.) By the same token an employer's advance announcement, made in a context of other unfair labor practices, that he will not bargain about a particular subject of compulsory bargaining, for instance a union shop, is as clearly coercive of the employee's rights protected by Section 8 (a) (1), as his actual refusal to bargain about such subject, upon request, is a denial of the rights protected by Section 8 (a) (5). The only difference between the two types of statements, like that between the two types of refusal to bargain, is a matter of degree. But in either case discouragement of employee support of the union is engendered by employer pressure in the form of an announcement that he will refuse to accord the union its full bargaining rights under the Act. Where, as here, the announcement is accompanied by a threat of economic loss to the employees—the closing of the store—the coercive nature of the employer's action is the more patent. Cf. *International Association of Machinists v. N. L. R. B.*, 311 U. S. 72, 76; *N. L. R. B. v. Reeves Rubber Co.*, 153 F. 2d 340, 341 (C. A. 9); *N. L. R. B. v. Holtville Ice & Cold Storage Co.*, 148 F. 2d 168, 169 (C. A. 9); *N. L. R. B. v. W. E. Lipshutz*, 149 F. 2d 141, 142 (C. A. 5).¹⁹

¹⁸ See also, *N. L. R. B. v. Montgomery Ward & Co.*, 133 F. 2d 676, 681, 682 (C. A. 9); *N. L. R. B. v. Security Warehouse and Cold Storage Co.*, 136 F. 2d 829, 832 (C. A. 9).

¹⁹ The majority of the Board (R. 25–26) distinguished its decision in *M. T. Stevens & Sons Co.*, 68 N. L. R. B. 229, referred to

The circumstance, noted by the dissenting Board member (R. 30), that at the time respondent engaged in the conduct in question the union-shop referendum then required by Section 8 (a) (3) (ii) had not been held, does not detract from the force of the Board's position.²⁰ The issue here, as the majority observed

by the dissenting Board member (R. 29-31). As the majority pointed out, the *Stevens* case, unlike the instant case, involved neither threats nor any other unfair labor practice, but a mere announcement of the company's open shop policy. Moreover, respondent's brief to the Board (a copy of which is being lodged with the Clerk of the Court for the Court's convenience), stating categorically that "the Respondent does not pretend, however, that there was any prospect of its yielding at the bargaining table" (p. 17), leaves no room for application of the *Stevens* rationale that "a policy, however strongly held, may, and often does, yield at the bargaining table" (68 N. L. R. B. at 230). Cf. *N. L. R. B. v. Westinghouse Air Brake Co.*, 120 F. 2d 1004, 1006-1007 (C. A. 3), holding that where the employer "was at pains to make clear and unmistakable that it would not contract with the union," its participation at bargaining conferences did not save it from an unfair labor practice finding, for "the vanity of bargaining where the employer has foreclosed in advance any possibility of agreement is patent. To say that in such circumstances the employer's participation in the negotiations is for the purpose of bargaining collectively would be to supplant actuality with mere seeming. The very situation renders impossible an exhibition by the employer of the good faith essential to the bargaining function." See also *N. L. R. B. v. Somerset Shoe Co.*, 111 F. 2d 681, 688 (C. A. 1).

²⁰ As already shown, Section 8 (a) (3) (ii) of the Act permitted an employer to make a union-shop agreement with the representative of his employees only after a majority of the employees had voted to authorize the representative to make such an agreement. This requirement was eliminated by the recent amendment of the Act (*supra*, p. 20, n. 16).

(R. 27), is not whether respondent was under an immediate obligation to bargain about a union shop, but whether, by foreclosing the possibility of present or future bargaining about the subject regardless of the obligation, respondent interfered with and coerced its employees in the exercise of their statutory rights. We have shown (*supra*, pp. 18-22) that such conduct constitutes interference and coercion in violation of Section 8 (a) (1) of the Act. Even assuming *arguendo* that respondent had no obligation to bargain about a union shop prior to the Union's winning an authorization election,²¹ respondent's anticipatory refusal to bargain would have been no less coercive than a declaration of purpose not to bargain at all made in advance of a union's attaining majority status, or the foreclosing of a written contract before substantive terms have been agreed upon. The *Elkland Leather* case, *supra*, 114 F. 2d at p. 224; the *Westinghouse* case, *supra*, 120 F. 2d at pp. 1006-1007; the *Somerset Shoe* case, *supra*, 111 F. 2d at p. 688; *N. L. R. B. v. Todd Co., Inc.*, 173 F. 2d 705, 707 (C. A. 2). Moreover, unless the Act protected the

²¹ But cf. *N. L. R. B. v. Andrew Jergens Co.*, 175 F. 2d 130, 134, certiorari denied, 338 U. S. 827, where this Court rejected the employer's contention that the Board's bargaining order, based on a refusal to bargain about a union-security agreement, was unenforceable in the absence of an authorization election. See also, *N. L. R. B. v. Bradley Washfountain Co.*, 192 F. 2d 144, 154 (C. A. 7), where the Seventh Circuit stated that "Though Section 8 (a) (3) of the Act requires that a union-shop proposal be approved by a majority of the employees before it can be reduced to a contract, such a proposal is the proper subject of bargaining before the vote is held."

freedom of expression of employee choice in a union-shop election against employer interference, the election itself would have been meaningless. Perforce, such an election under Section 8 (a) (3) (ii) required the same protection that has always been guaranteed to ordinary representation elections under Section 9 (c). *N. L. R. B. v. Oregon Worsted Co.*, 96 F. 2d 193, 195 (C. A. 9); *N. L. R. B. v. National Plastic Products Co.*, 175 F. 2d 755, 760 (C. A. 4).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Board's findings are supported by substantial evidence on the record considered as a whole, that its order is valid and proper, and that a decree should issue enforcing the Board's order in full.

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FEBRUARY 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. IV, Secs. 151 *et seq.*) are as follows:

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

UNFAIR LABOR PRACTICES

SEC. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employer in the exercise of the rights guaranteed in Section 7;

* * * * *

(3) by discrimination in regard to hire and tenure of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the rep-

representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: * * *

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

(e) (1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9 (a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

(2) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3) (ii), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 (a) the Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board * * * shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency * * *.

(c) The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *. In case the evidence is pre-

sented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred * * * for the enforcement of such order * * * and shall certify and file in the court a transcript of the entire record in the proceeding * * *. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power * * * to make and enter upon the pleadings, testimony and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

The relevant provisions of Public Law 189, 82nd Congress, 1st Session (approved October 22, 1951), further amending the National Labor Relations Act, as amended, are as follows:

*

*

*

*

*

(b) Subsection (a) (3) of section 8 of said Act is amended by striking out so much of the first sentence as reads “; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election had voted to authorize such labor organization to make such an agreement:” and inserting in lieu thereof the following: “and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement:”

(c) Section 9 (e) of such Act is amended by striking out all of subsections (1) and (2) and inserting in lieu thereof the following: “(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.” Renumber subsection “(3)” as “(2).”

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
W. T. GRANT COMPANY,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

RESPONDENT'S BRIEF

EUGENE M. FOLEY,
Attorney, W. T. Grant Company.

FILED

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.

W. T. GRANT COMPANY,
Respondent.

RESPONDENT'S BRIEF

The Board's Conclusions of Law

In this proceeding, relating to respondent's store in San Jose, California the Board found that respondent had violated the National Labor Relations Act as amended, holding that respondent

1. unlawfully refused to bargain with Retail Clerk's Union Local 428 A. F. L.,
2. unlawfully interrogated its employees concerning the wearing of union buttons,
3. was required to but did not consult with the union with reference either to the granting of wage increases or to the establishment of a uniform work-week for female employees (by changing the work-week of a minority from a forty hour-six day week to a forty hour-five day week) and
4. unlawfully notified its employees that it would never bargain with respect to compulsory union membership.

Summary of Argument

Respondent respectfully submits that none of the charges can be sustained; and since the total case against respondent cannot exceed the sum of its parts, the petition for enforcement of the Board's order should be denied.

After first claiming bargaining rights, the union obtained authorization cards from, at most, twenty of respondent's thirty-nine non-supervisory employees. These were presumptively valid; but respondent showed that one of the authorizations had been revoked. The Board, on the other hand, held, in effect, that the cards were conclusively valid. The respondent maintains that, in so holding, the Board committed error.

The charge that respondent questioned its employees concerning their union activities is without substance. True, Mrs. Kleidon, the assistant manager referred to union buttons as "pretty buttons" and talked "jokingly" about them but certainly this was not coercive and in any event she was not acting within the scope of her employment.

As to the establishment, during the organizational campaign, of a uniform five-day week (affecting about one-third of the female employees but without any change in the hourly work-week) and the granting of wage increases, respondent had a perfect right to make these adjustments in the normal course of business and to meet competition.

With respect to operating a union shop, respondent at no time said it would not bargain about it. It said then and it says now that it would not agree to a union shop; for it considers it un-American to attach a condition to the right to work, particularly in an instance such as this where twenty employees might require nineteen others to join a union against their will.

Argument

The Board's Brief

The Board in this case seems to be unmindful of the fact that

“The powers conferred upon this court by the National Labor Relations Act to enforce the orders of the Board are equitable in nature and may be invoked only if the relief sought is consistent with the principles of equity” (*N. L. R. B. v. National Biscuit Co.*, 3rd Cir. 185 F. 2d 123, 124).

For not only are the facts colored and sometimes misstated but the union's transgressions are brushed aside. Moreover, the Board's arguments are based on false hypotheses: (a) that the union was designated as the representative of a majority of respondent's employees (b) that respondent interrogated its employees in regard to their union activities (which is fully answered in Point II herein) and otherwise tried to destroy the union's majority status (which is fully answered in Points III and IV herein) and (c) that respondent announced to its employees that it would close its store before it would “bargain” with respect to its operating a union shop.

In addition, it is said in the Board's brief that twenty-three employees received wage increases and eight were promoted, whereas the fact is, and the Board found that the promotions which were accompanied by wage increases, are included in the twenty-three wage adjustments made in February, 1950 (R. 24). And, the General Counsel's foot-note 6 on page 4 and in the foot-note on page 10 indicates that the respondent's store manager told the employees that they did not have to join the union whereas the testimony, including that to which he

points, clearly shows that the manager said "any of the girls that want to join are free to do so" (R. 141, 147).

As to the General Counsel's assertion that respondent refused to bargain with the union "after it had been designated as their bargaining agent by a majority of respondent's employees", respondent contends that there is considerable doubt as to whether the union ever represented a majority; for the only point that is certain is that, at most, it represented only eighteen of respondent's thirty-nine non-supervisory employees when, on January 5, 1950, it made its claim of majority representation. Nowhere in the Board's brief is reference made to this fact, namely that on that day, January 5, 1950, the union orally claimed bargaining rights (R. 169) and addressed to respondent a letter calling for negotiations (R. 70). Instead, the Board speaks, not as to the sending of the letter, but only of the receipt thereof by respondent at the opening of the store on January 6, 1950. The reason therefor is clear; during the day on January 6th after the receipt of the union's letter three additional employees signed union cards thus giving the union a putative majority of one on that day. But no demand to bargain was made after the unjustified demand of January 5th. Besides, no reference is made in the Board's brief of the fact that, at the very outset, the respondent's store manager told the union representative to petition the Board for an election (R. 170). The fact is that aside from one day, January 6th, 1950, the union never had a majority "signed up" because of the resignation of Marie Joldersma who signed Exhibit No. 31 and the revocation of the Guillory authorization (Exhibit No. 16). But the Board does not charge a refusal to bargain on January 6th. It is on January 25, 1950 that the offense is supposed to have been committed when respondent's attorney met with two union officials. On that day, however, aside from respondent's statement of its abhorrence of compulsory union membership and, on

the other hand, the union's statement that it would never permit respondent to operate an open shop, the meeting was confined entirely to a discussion of ways and means of proving the union's majority status, the respondent suggesting that it should be done by means of a secret election conducted by the Board and the union insisting "that we don't have an election, since it takes so much time and so much nonsensical procedure" (R. 206).*

As to the completely unjustified charge that respondent threatened to close its store rather than "bargain" with respect to compulsory union membership (answered, in part, in Point V herein) the General Counsel relies mainly on a letter sent by the writer of this brief to respondent's store manager. He says "the letter added the open threat that 'if we can't do business in San Jose on an open shop basis, we just won't do business in San Jose' ". In the first place the letter was privileged under Section 8 (c) of the Act; for it had no reference whatever to organizational activities. In this respect it may be likened to a situation where a union says "We'll get \$5 an hour for salesgirls", and the employer counters that "If we can't do business there at a reasonable payroll expense we'll move our business elsewhere". Certainly, such a statement would not indicate refusal to bar-

* The respondent, it is claimed, delayed a determination of the issue of union representation, in that it had a fixed idea as to the appropriate unit (R. 119) and, as it informed the union on January 5, 1950, desired the issue to be resolved by an election. The union, however, delayed the filing of its petition for twenty-six days. The respondent thereafter cooperated with the Board in its procedural requirements (Exhibit 44, p. 75) and, on March 17, 1950 filed its brief on the unit question. (Receipt therefor is shown at p. 181). Like respondent, the union had until March 24, 1950 to file its brief. After receipt of respondent's brief, however, the union asked for additional time. This application was denied (Exhibit No. R. 5 on p. 182). Later, on April 4, 1950 the Board directed an election to be held within thirty days. The union then asked the Board to set the election for May 3rd (R. 110). And yet it is the respondent who is accused of causing delay!

gain about wages. In the second place it's absurd for the Board to urge that this letter should be interpreted as meaning that respondent would rather abandon its large investment in the San Jose than sit down at the bargaining table. But, the circumstances under which the letter was written militate against any finding that respondent, alone, indicated a fixed intention not to come to an agreement with the union on an issue of compulsory union membership—if the union were selected as the employees' bargaining agent: On January 25, 1950 the writer of this brief told the union officials that respondent looked with disfavor on compulsory union membership or as Mr. McLoughlin, Secretary-Treasurer of the union put it: "union security was something that the company didn't look too favorably on" (p. 32 of typewritten record). To this Mr. McLoughlin, at that meeting, said that the union would never permit the store to be operated as an open shop (R. 171, 187). In February 1950, there were rumors in the store that all employees would be required to become union members (R. 171) whereupon the store manager posted on the store's bulletin board General Counsel's Exhibit No. 56 (R. 139). Subsequently, on March 16, 1950 the union's Business Representative (R. 114) Lazarro, invaded respondent's store, turned over "curtains and things" on thirty-five or forty feet of counter space (R. 166) after "roughing up of Department 11, which is men's and boys clothes" (R. 164), visited the yard goods counter, "picking up pieces of material and stringing it out over the counter" (R. 168, 184) and then urged a customer not to buy in respondent's store (R. 184). Next, in the sequence of events was the letter under attack. Respondent contends that there was ample justification for writing it. But quite apart from this, is there any wonder that the employees thereafter abandoned this union, causing it to withdraw its petition for an election?

The General Counsel cites sixty-six cases in support of the Board's conclusions but an analysis of these cases convinces respondent that not a single one is either applicable or justifies the Board's action in this case. Neither space nor time would permit respondent's comment on all of these cases; thus the writer of this brief refers only to the three cases on which the General Counsel seems to rely most heavily, *viz.*: The cases involving *Elkland Leather Company*, 114 Fed. 2nd 221, the *Bailey Company*, 180 Fed. 2nd 278 and *Joy Silk Mills, Inc.*, 185 Fed. 2nd 732.

N. L. R. B. v. Elkland Leather Co., 114 Fed. 2nd 221, referred to on page 21 of the Board's brief was decided in November 1940 several years prior to the free speech amendment, Section 8 (c) to the Act and before the acceptance of the principle that the employer could speak freely provided he made no threats or promises.

In *N. L. R. B. v. Bailey Co.*, 180 F. 2d 278, "during the week preceding" a Board-directed election the employer—to quote the court—"called each of its employees to its office and after impressing upon each of them its opposition to the union, proceeded to advise them of its intention to grant certain economic benefits to them * * *. The Board based its findings of an unfair labor practice upon the promises of economic benefits made by the company to the employees immediately preceding the election" (at p. 279). This case is not applicable for here no promises (or threats) were made to the employees immediately prior to the election or at any other time.

In *Joy Silk Mills, Inc. v. N. L. R. B.*, 185 Fed. 2nd 732, despite the fact that by September 16, 1948 a large majority (73% of the employees, according to the Court's count and 84%, according to the Board's findings: 85 N. L. R. B. at 1273) of the employees had signed authorization cards and the further fact that the employees were

on strike, the management met with the employees, discussed conditions for a return to work, negotiated with respect to and settled certain grievances and promised the employees paid vacations. Later, the employer promised to all employees a rest period and shift rotation "if the majority of the employees wanted rotation", cursed the union when an employee presented a grievance, threatened another who refused to say how he would vote, told a third that the union was run by a bunch of crooks, cautioned another not to seek votes for the union, questioned various employees concerning their views and indicated to them "that job security might be threatened and that perhaps wage rises and other benefits might not be forthcoming if the union got in". There is no such background in the instant case and thus the Joy decision is not, in the least, applicable. The Court's conclusion there, that the employer had unlawfully refused to bargain, was based on two findings, *viz.*: that the union had "a large majority" and further that the employer by coercive activities had caused the union's loss of strength.

I

The respondent was not under any duty to bargain with the union.

As to the charge that it unlawfully refused to bargain, respondent contends that it was not under any duty to bargain in advance of the employees' selection of a bargaining agent, in a secret election because (1) the union did not represent a majority of the employees when, on January 5, 1950, it demanded that respondent negotiate (further contending that the fact that the union eventually had authorization cards from twenty of respondent's thirty-nine non-supervisory employees did not render valid *ab initio* the union's spurious claim) and (2) under the facts, the issue of union representation should have been resolved by a board-conducted election.

A.

The union did not represent a majority of the non-supervisory employees when it asserted that it had the right to call for negotiations.

The union did not and does not truly represent a majority of the employees. On January 5, 1950 the union represented to the respondent, orally (R. 169) and in writing (General Counsel's Exhibit No. 36, R. 70) that it had been selected by a majority of the employees as their bargaining agent. Having no knowledge or information as to whether the union did or did not represent a majority or, indeed, any of the store people, the respondent suggested to the union's representative that a petition for a representation election be filed with the National Labor Relations Board (R. 170, 171). The union was, at first, unwilling to do so (R. 186) but later, on January 31, 1950, filed such a petition. Eventually an election was directed and, after discussions between the union and the Board's representatives "to clear our (the union's) own timing as far as the availability of our own dates were concerned" the election was set for May 3, 1950 "the agreeable day" to the union (R. 110). However, on May 2nd, the eve of the election, the union withdrew its petition and filed charges alleging, among other things, that the employer had unlawfully refused to bargain.

The Trial Examiner found that the oral and written demands to bargain, made on January 5th, 1950 were properly made since the union had "obtained authorizations from a majority of respondent's employees" (p. 37); but, the testimony adduced by the General Counsel himself showed that, on January 5, 1950, the date on which the union made its only demand for recognition, it had authorization cards from but eighteen (18) of the thirty-nine (39) non-supervisory employees (See Exhibits dated Jan-

uary 6th, 1950, to wit: Ex. 16 on p. 80, Ex. 17 on p. 81, and Ex. 18 on p. 82).*

Indeed in its decision the Board wrote:

“The record reveals, contrary to the Trial Examiner’s findings, that the union first established its majority on January 6, 1950, not January 5, 1950” (R. 23).

Upon receipt of the Board’s Decision and Order upholding the Trial Examiner’s findings, the respondent sent a telegram to the Board requesting a reconsideration of its decision, in the light of the decision of the United States Court of Appeals, Sixth Circuit, rendered a week earlier in *N. L. R. B. v. Valley Broadcasting Company* (189 Fed. 2d 582, June, 1951); and later, on June 21, 1951, served and filed a formal notice of motion for a reconsideration and expunction of that part of the Board’s decision in which it was found that respondent violated section 8 (a) (5) of the Act (R. 60).

* Apparently, noticing the falsity of the union’s representation on January 5, 1950 that it had been selected by a majority, the Trial Examiner points out, as if it had any significance, that on January 25, 1950 the union had in its possession authorization cards signed by twenty of the thirty-nine non-supervisory people then employed (R. 37). That fact—if it were a fact—would not render valid the demand made on January 5th, 1950—the only demand that was ever made. But, even so, respondent contends that in the meantime Omera Guillory had revoked her authorization and that on January 25, 1950 the union had in its possession only nineteen presumptively valid authorizations from the thirty-nine employees in the unit. Unfortunately, the Examiner cut off testimony to show that the Guillory authorization was revoked (surely no formal ceremony or special words are required to effect a revocation) but anyway, it was shown that, as a result of what Mrs. Guillory had said to another employee, the union organizer visited the former at her home (R. 163-164) asking her to reconsider or, as he put it “asking her to join the Union” (R. 130). Respondent submits that the union organizer’s own language proves beyond doubt that her authorization had been revoked.

The union's attorney opposed such motion by means of a telegram to the Board worded as follows:

“VALLEY BROADCASTING CASE NOT IN POINT BECAUSE NO REQUEST FOR BARGAINING MADE BY UNION. IN OUR CASE UNEQUIVOCAL DEMAND MADE ON JANUARY 5, 1950. SEE GENERAL COUNSEL EXHIBIT NUMBER 36. MOTION SHOULD BE DENIED FORTHWITH.”

In an order dated July 11th, 1951 the Board denied the motion, “on the ground that a proper demand for bargaining was made, and therefore, the Valley Broadcasting Company decision is not applicable” (R. 61).

Unfortunately, the Board did not indicate how it determined that the demand which the Board, itself, found was made before the union obtained authorization cards from a majority of the employees was “a proper demand”; but respondent submits that the Board's characterizing such a demand as “proper” does not of course, prevent this court from deciding the question:

Does an employer's failure to accede to a union's demand to bargain, made before the union even presumptively represents a majority, constitute an unlawful refusal to bargain?

Respondent believes that the mere statement of the question furnishes its reply: A spurious demand, based on a false representation of majority status imposes on the employer no obligation to bargain or consult with the union about anything. The respondent, however, ventures further: It is submitted that, to safeguard the rights of employees to a free choice of their bargaining representative, the courts must re-examine the Board's rule that an employer's refusal to bargain with a union on demand is justified only when such refusal is motivated by a bona fide doubt that the union represents a majority.

B.

The Board should have conducted an election to determine the issue of union-representation.

It developed at the hearing of the charges against respondent, held on November 13, 1950, that, of the thirty-nine non-supervisory employees on its payroll of January 25, 1950, twenty had signed union cards (R. 37). On the basis of this finding the Trial Examiner found (R. 52) and the Board held (R. 23) that the mere possession of these cards was sufficient to make the union the lawful bargaining representative of the employees of respondent's San Jose store. In explanation it was said that

“It is immaterial in determining the Union's majority status that some of those signing authorization cards attended no or few union meetings or otherwise indicated a lack of interest in union activities” (R. 37).

and further that

“A Board election is only one of several ways in which the majority status of a labor organization may be determined, and where only one labor organization is claiming representative status, an employer has no absolute right to have the matter determined by an election. If the Respondent had a bona fide doubt of the Union's majority it might very properly have asked for proof of such majority, and refused proof, might properly have withheld recognition until proof, in one form or another, was furnished it. There is no evidence here that the Respondent had a bona fide doubt of the Union's majority status, and it made its position clear that it would accept no proof of such majority except through a Board election” (R. 52).

This decision is in line with an earlier Board decision (E. A. Laboratories, 80 N. L. R. B. 625) where it was said

that "Elections are held to settle questions concerning representation—to resolve real doubts, not feigned ones." But here, if it be assumed that the Guillory authorization was not revoked, that all twenty of the thirty-nine employees had signed the authorization cards, freely and without pressure from union organizers or union-minded co-employees, the union still represented only 51%: a majority of one of respondent's non-supervisory people. To contend, as the General Counsel does, that there was no doubt of the union's right to speak for a majority is tantamount to saying either that the majority was overwhelming and respondent knew it or that when, on January 5, 1950, the union made its demand for recognition it was certain that it had or would soon have authorizations from a majority and further, that there could be no expectation that a single employee of the twenty who did or would sign, might vote NO at a secret election.

The instant case is reported at 94 N. L. R. B. 145. It had recently been held in *In re F. C. Russell* (92 N. L. R. B. 206), that the questioning of an employee either "concerning the outcome of the Board election" or "as to his union views" is *per se* a violation of the Act, irrespective of the employer's motives. To this rule the Board now adds another: an employer may refuse to bargain on a union's demand only when he has a bona fide doubt as to the validity of the union's claim of majority representation. (Funk and Wagnall's Desk Standard Dictionary says a "doubt" is a "lack of certain knowledge; uncertainty; indecision;" adding that "Doubt is lack of conviction".)

Now, it should be obvious that, for an employer to know, with a reasonable degree of certainty, whether a majority has or has not freely chosen a bargaining agent, he must seek facts; and clearly he cannot do so effectively without interrogating his employees, *i. e.* committing an unfair labor practice. Since the respondent did not do this it does not seem amiss to say that the Board has found the respondent guilty of not doing what the Board forbids.

But, in no case should an employer's belief as to whether a union's organizational campaign was or was not successful be the test as to whether a union should or should not be recognized as the spokesman for his employees. If it were, it would materially weaken the guarantees of the Act; for the extent of employees' protected rights would be made to vary with the state of the employer's mind. It follows that the issue of representation should have been determined in a secret election.

Never in this writer's experience has a secret election been a futility. Consciously or not the Board in establishing the rule that an election should not be held unless there is a "real doubt" (which it has not defined) muzzled employers from presenting facts, arguments and opinions to their employees, as well as having precluded employees from making a secret choice of union or no-union.

Anyone engaged in the practice of labor law well knows, and the Board's records will convincingly show, that at a free election, it very often happens that the union receives less votes than the number of authorization cards it was able to gather in its organizational campaign. For it is common knowledge that these authorization cards are often signed under pressure of union organizers, whether they be paid organizers or union-minded co-workers, and are not infrequently signed as a result of misrepresentation. Two such instances, both involving this respondent, occurred in the experience of the writer of this brief. In one of these, involving respondent's store in Gadsden, Ala. (Case No. 10-RC-1204) the union's petition showed that thirteen of a unit of twenty employees had signed authorization cards. But only ten of the employees voted for the union, the election resulting in a tie vote. In the other, involving respondent's store at Bellaire, Ohio (Case No. 8-R-2669) the unit consisted of nineteen employees and whereas ten of these, according to the Union's petition, had signed authorization cards, only three of the nineteen voted for union representation. This was probably the result of respondent's ex-

posure of deception practiced by the union on the employees, in fraudulently exaggerating the wages and working conditions under the union's existing contracts in the community, the terms of which were actually far less liberal than the conditions which had prevailed for many years in respondent's store. Nevertheless, had the union there taken the steps that the union here has taken the Board would have directed the employer, this respondent, to bargain on the basis of the authorization cards.

Respondent's *Ybor City* case (Case No. 10-RC-S38), where the union was selected by a vote of 8 to 6, might have been still another instance where the union gathered more authorization cards than votes; but by the time this election was held the board had discontinued the practice of revealing to the employer, the number of cards supporting the union's petition.

The respondent respectfully submits that the courts should bring to a halt this practice of forbidding employers from showing their people the other side of the coin and at the same time frustrating employees who might wish to express a free choice in a secret election.

II

The employees were not interfered with, restrained or coerced when Mrs. Kleidon the assistant manager passed remarks about the wearing of union buttons; nor was she acting within the scope of her employment when she made those remarks.

In considering the question whether the three employees, De Janvier, Putney and Nix were interfered with, restrained and coerced, thought should be given to the respondent's policy reiterated from time to time in announcements to employees, *viz.*: that the company recognized the right of its employees to join or refrain from joining a union (General Counsel's Exhibit No. 56,

R. 139). With this policy brought daily to the attention of the employees by means of the communication signed by the store manager and posted on the bulletin board, the respondent submits that it cannot fairly be found that Mrs. Kleidon was acting within the scope of her authority when she made comments about the wearing of union buttons.

Mrs. Kleidon was "always pleasant, good humored and talkative" (R. 150). Mrs. De Janvier testified that she talked "kiddingly" about union buttons (R. 143). Mrs. Putney said she did so "jokingly" and Miss Nix testified that she "said it in kind of a joking way" (R. 150).

These witnesses were Board witnesses and the Examiner indulged in the all too frequent practice of giving credit to that part of testimony that was favorable to the Board's charge and discrediting that part which was unfavorable, finding, as he did, that Mrs. Kleidon's remarks were made coercingly and not jokingly.

In *N. L. R. B. v. Reynolds*, 162 F. 2d (7th Cir.), 680, Fleishhaker, the General Manager (like Mrs. Kleidon, the Assistant Manager of this thirty-nine-employee store) "appears to have been in a talkative mood and on quite friendly terms with Fisher, Bullard and Lingle". In a conversation with these three employees he stated "I have lived under Hitlerism and I have lived under Americanism and I have been under laborism" and "you know out of the three isms, the only one that is any good is Americanism. I am telling you, this unionism has to stop, I would never get mixed up in any labor movement". This statement, the Court said, "was clearly an expression of his own opinion and there is not the slightest reason to think that it was for the purpose of or that it had any coercive or restraining effect upon the employees to whom it was made".

It is to be noted that Mrs. Kleidon did not presume to suggest, for example, that the store manager or the company does not want employees to wear union buttons (R. 151). Nor is there even a suggestion in the record that Mrs. Kleidon or anyone else in respondent's supervisory organization was hostile toward unionization. The background so frequently relied on to characterize the practice complained of is completely lacking in this case.

It is suggested that the Board's stigmatizing the respondent for Mrs. Kleidon's remarks borders on the absurd; for, among other things, the notice on the bulletin board (General Counsel's Exhibit No. 56) was a continuous disavowal of her comments. Besides, her remarks constituted no threat or intimidation, or promise of favor or benefit and thus, as stated in *N. L. R. B. v. Montgomery Ward and Company Incorporated*, 2 Cir., Oct. 1951, — Fed. 2d — they

“were not unlawful, particularly after the 1947 amendment of the Act found in § 8 (c), 29 U. S. C. A. § 158 (c) *N. L. R. B. v. Sandy Hill Iron & Brass Works*, 2 Cir., 165 F. (2d) 660, 662; *Sax v. N. L. R. B.*, 7 Cir., 171 F. (2d) 769.”

It follows that Mrs. Kleidon's remarks did not constitute a violation of Section 8 (a) (1) of the Act.

III

Nor was the granting of wage increases a violation of Section 8 (a) (1) of the Act.

During the week ending February 23, 1950 “twenty-three (employees) received merit (and promotional) increases” (R. 39). Although the General Counsel and the union had the burden of proof neither attempted to show that these increases brought the wages above the going

rate. Respondent thereupon sought, through James P. McLoughlin, the Secretary-Treasurer of the union (R. 69), to prove the negative, *viz.*: that the increases in wages that were given during the week of February 23, 1950 did not bring the wages of any respondent's employees above the going rate (R. 111). The union's counsel objected to this, arguing (at the foot of p. 111) that "the cross examination with reference to wages, Kress' or anywhere else, has nothing to do with that; secondly, wage scales in other stores have, as I can see, no connection at all with the unilateral granting of a wage increase by this employer" (p. 112, first line). His objection was sustained. Later, however, the General Counsel sought to show (R. 188) that the respondent's counsel knew the rates prevailing in the S. H. Kress store and that the increases given by the respondent matched them but, unfortunately, respondent's counsel had no personal knowledge on the matter.

Respondent had a right to grant these increases. "The Act does not preclude an employer from introducing benefits during an organizational period" (*Joy Silk Mills v. N. L. R. B.*, 185 F. 2d 732, 739).

In the Matter of Bergmann's, Inc., 71 N. L. R. B. 1020, the Board held that an employer has "a perfect right", during a union's organizational campaign, to grant wage increases, holiday and vacation privileges, if they are granted "in the normal course of its business, or to meet the competition of other employers in the same area" (p. 1031). In that case, the union's organizational campaign came to the attention of respondent's president in the latter part of July or the first part of August 1945. He thereupon called upon his attorney for advice. The attorney asked Mr. Bergmann about the wages he was paying and then advised him that if he was not then paying a "going wage" * * * "to at least pay what the" other laundries in the area were paying. Bergmann did noth-

ing about this advice on or about December 12, 1945 (p. 1020). On that day, (p. 1031):

“the respondent posted its notice that the number of holidays granted to the employees was to be tripled, and a vacation policy, hitherto non-existent was to be instituted. That notice also referred to wage increases which would be forthcoming, *if the OPA were to grant the respondent permission to raise its prices*. Nevertheless, on March 7, 1946, the day before the scheduled election, respondent notified its employees in a letter ‘that it would grant these increases regardless of the OPA’s decision on the pending application to increase prices’. The respondent contends that it promised wage increases and granted holiday and vacations with pay to its employees because other laundries in the area had done so. The record presents insufficient facts to indicate that other laundries did raise their wages or grant vacations and holidays on or about December 12, 1945 or March 7, 1946. The undersigned therefore makes no finding with respect to any increases in pay, or vacations or holidays granted by other laundries in the area to their employees at those times. In any event, the undersigned does not consider this contention to have merit since it is clear that the respondent promised a raise in wages to its employees on March 7, 1946, the day before the election, for another reason which had little or nothing to do with what the respondent’s competitors were doing with respect to vacations, holidays or wages.

“The distribution of this letter on the eve of the election was, in effect, an adroitly timed maneuver intended by the respondent to persuade its employees to repudiate the Union. The respondent knew, between February 1 and 13, 1946, that it had the right to raise wages without consulting OPA, and according to the respondent understood that it was

required to do so since it had already 'promised' to do so in its notice posted on December 12, 1945. But it did not make the announcement of its intentions to its employees until the evening of March 7, 1946. Respondent's choice of this opportune moment for notifying its employees was not a coincidence, but a studied move to lead the employees to cast their votes against the Union. By its well-timed announcement of this economic concession as well as by other means, the respondent sought to show the employees that they could rely exclusively upon it for economic advantages and minimized the need for a collective bargaining agent. The effects of such an object lesson in the futility of self-organization upon the free exercise by the employees of their right to choose a bargaining representative needs little elaboration."

In the Matter of Continental Oil Company, 58 N. L. R. B. 169 the Board said at 172:

"It is virtually impossible to ascertain the full effects upon the employees' free exercise of the right to select a collective bargaining representative of the W. L. B.'s announcement just prior to the run-off election that it had approved the wage increase * * *.

"We shall, therefore, sustain the C. I. O.'s objection as to the premature release and posting of the W. L. B. ruling approving the wage increase, and we shall set aside the run-off election held on May 9 and 10, 1944."

In the Matter of La Salle Steel Company, 72 N. L. R. B. 411, the Board said at page 414:

"We agree with the Trial Examiner that the respondent, by announcing, on the very day of the election that the National War Labor Board, herein called

the W. L. B., had approved wage increases for the employees, interfered with its employees' freedom of choice in the election of April 20, 1945, in violation of Section 8 (1) of the Act. * * * Moreover, quite apart from the respondent's motive, we are convinced and find that the timing of the announcement prevented a free choice by the employees in the election. We, accordingly, sustain the Union's objection to the election based on the respondent's publication of the action taken by the W. L. B. and we shall therefore set aside the election held on April 20, 1945'.

In the Matter of Goodall Company, 68 N. L. R. B. 252, it was said at page 265:

"Although the Regional War Labor Board notified the respondent by letter, dated April 28, 1944, that it had approved the vacation plan with certain modifications, the employees were not informed of this until May 30, the day before the election, when President Ward announced it in his speech to the assembled employees. * * *

"In agreement with the Trial Examiner, we find that the timing of Ward's announcement of the vacation plan on the day before the election was calculated to influence the employees to reject the Union in the election and that the respondent thereby interfered with the right of its employees to self-organization, in violation of Section 8 (1) of the Act."

In the *Bergmann* case, the Board said that the employer had a right to grant wage increases between February 1 and 13, 1946, *i. e.*, anytime between the fifth and third week before the election but it was wrongful to grant them on a March 7th, 1946 "the day before the election". In the *Goodall* case it was indicated that the employer had the right to announce the vacation plan a

month before the date set for the election. In the instant case, the wage increases were granted *ten* weeks before the date of the scheduled election not "just prior to" as in the *Continental Oil Co.* case or "the very day of the election" as in the *La Salle Steel Company* case. Respondent, therefore, urges that it had "a perfect right" to grant the increases and was under no obligation to consult with the union for three reasons:

- (1) the union's claim of majority representation was false when made;
- (2) the increases were granted "in the normal course of business" and
- (3) the increases were granted "to meet competition".

It follows that the granting of the wage increases was not a violation of the Act.

IV

The Board's counsel conceded that "a great many people" and "a majority" of the employees in the unit were working on a 40 hour five day week before the union came on the scene. It was error to hold that respondent had no right, ten weeks prior to the scheduled election to make its work-week uniform by changing thirteen employees from a 40 hour six-day week to a 40 hour five-day week.

On February 23rd, 1950 the work-week of thirteen of the thirty-seven female employees (R. 41) was changed from a forty hour, six day work week to a forty hour, five day work week. The Examiner found that the respondent made this change in the work week thinking that there would then be "less incentive for them (the employees) to work and vote for the union" (R. 42).

In the first place, the record is barren of even a suggestion that the change was considered desirable by any but one of the female employees involved (R. 41).

In the second place there is not a scintilla of evidence that the attainment of a five day week was in the mind of a single employee who signed an authorization card (R. 129).

Furthermore, the General Counsel conceded (R. 158) that before there was any talk of unionization "a great many people" (R. 157) and "a majority" (R. 158) of the employees had had a work week of five days, forty hours, and respondents submits that the testimony shows that any employee could have had a five-day week for the mere asking (R. 161, 167). Respondent respectfully contends that this change was too remote to influence the election, had one been held; and in any event, it had a right to make this change in the normal course of its business and to meet competition (R. 144).

V

In notifying its employees that it would not agree to make union membership a condition of employment the respondent did not violate the Act.

On January 25, 1950 respondent's representative informed the Secretary-Treasurer of the union that it did not look with favor on compulsory union membership (R. 186) whereupon the union's representative countered with "We'll never go for that" (R. 187) or "We just can't go for that" (R. 171). Did this indicate a fixed intention on the union's part to refuse to bargain on the union shop if it were selected by a majority of respondent's employees as their bargaining agent? Neither the Board nor the Examiner answered this question (41st and 42nd Exceptions, R. 21).

Early in February, 1950 there were rumors (R. 171) "to the effect that if the store was organized it would

definitely be a union shop and at that time, or a little while later I (the store manager) did post a notice" (General Counsel's Exhibit No. 56).

Was it illegal for the employer to speak about the prospect of compulsory union membership in terms as strong as the union used on January 25, 1950? Both the Examiner and the Board (with one member dissenting) answered this question in the affirmative.

In *American National Insurance Co. v. N. L. R. B.*, 187 F. 2d. 307 (5th Cir.), the Trial Examiner wrote:

"3. * * * True, the Act recognizes (Section 1) that inequality of bargaining power existing between unorganized employees and organized employees burdens commerce but in ameliorating this condition the Act protects employees in their right to self-organization only. Economic strength is still the underlying touchstone of success at the bargaining table."

The Board, however, overruling its Examiner, found the employer guilty of refusing to bargain with the union by, in effect, insisting on a clause embodying the functions and prerogatives of management. The Court on the other hand held, that the employer's insistence on the inclusion of the prerogative clause was not any less in good faith than the union's was in resisting its inclusion. It said (at p. 310)

"It was not, therefore, as the Board finds, the steadfastness of the employer alone, in insisting on its point. It was the steadfastness of the employer and the union, the one in proposing, the other in opposing, a clause of this kind, which the employer felt it ought and the union felt it ought not to have * * *.

"Before the enactment of the National Labor Relations Act, as amended, there was despite the decisions of the courts to the contrary, some understandable confusion as to what 'collective bargaining' required of

employees. This was due to the persistence of the board in asserting and pressing its view that the use in the National Labor Relations Act of the words 'collective bargaining' meant that the employer had to agree to terms proposed by the union, if in the opinion of the board these terms were reasonable, and that a failure to agree to such terms was a basis for a finding that the employer was not bargaining in good faith. Since, however, that term has been defined in the National Labor Relations Act as amended, 29 U. S. C. A., sec. 158 (d), there is no longer any basis for differences of opinion as to what it means or for board orders in effect requiring the employer to contract in a certain way."

"* * * in the quotation from the examiner's report, set out in note 3 above, the law is correctly stated".

In the *Matter of La Salle Steel Company*, 72 N. L. R. B. 411, the Board said at page 413:

"The Trial Examiner found that the respondent's letter of April 19, 1945 was violative of the Act. He rejected the respondent's defense of free speech on the ground that the letter was an integral part of the respondent's campaign against the Union, and on the further ground that the respondent unlawfully distributed the letter to its employees by attaching copies thereof to the employees' time cards. We do not share all his views. * * * Nor do we agree with our dissenting colleague that the statements contained in the letter that employees would be protected in their right to work 'irrespective of membership or non-membership in any labor organization' and that the respondent would not be 'a party to any agreement' whereby employees would be 'compelled to pay for the right to continue to work for this company' did violence to the employees' rights. These statements did not establish such a fixed determination by the respondent not to bargain later concerning union security as can reasonably be regarded

as constituting interference with the rights of employees within the meaning of Section 8 (1) of the Act. * * *

In *Matter of Tygard Sportswear Company and ano.*, 77 N. L. R. B. 613, it was found (p. 624), that

“Both Lerner (Vice-President: p. 622) and Garvey (Plant Manager) stated frankly that the plant would remain an open shop in the event the employees voted for the union.”

The Board said (p. 614):

“We do not, however, adopt the Trial Examiner’s conclusions concerning the speeches made by S. R. Lerner and James D. Garvey on June 13 and 14, 1946. The Trial Examiner found that these speeches were violative of Section 8 (1) of the Act, because they were part of a coercive course of conduct, and because they contained certain statements concerning the respondent’s ‘open shop’ policy which the Trial Examiner interpreted as an anticipatory refusal to bargain concerning the union security issue. We disagree with this interpretation and find that the statements in question did not evince a fixed determination not to bargain on the subject of union security. We also disagree with the Trial Examiner’s theory that the speeches, which otherwise consisted only of argument and opinion, acquired a coercive character because the respondents had on other occasions by their actions and statements violated section 8(1) and (3) of the Act.”

In *N. L. R. B. v. Union Pacific Stages*, 9th Cir. 99 Fed. 2d 153, the Court held similarly, saying at page 163:

“The evidence shows that the Company was conducting its business on the open shop basis; in doing so the respondent was within its legal rights. If the talk of

Walsh its president, amounted to no more than a declaration of that policy it did not violate the Act.”

Respondent was not under any duty to stand mute on its policy regarding compulsory union membership. Nor can it be fairly held that a statement of an unwillingness to agree is tantamount to an unwillingness to bargain.* For the Board itself has held in the *Matter of Stevens*, 68 N. L. R. B. 229.

“A policy, however strongly held may, and often does yield at the bargaining table.”

The respondent, however, does not pretend that there was any prospect of its yielding at the bargaining table. Its contention here is that it did not at any time indicate that it would not bargain on any subject if the union were selected as the employees’ bargaining agent.

CONCLUSION

It is respectfully submitted that the Board’s findings are not supported by substantial evidence on the record considered as a whole, that its conclusions are contrary to law, that its order is unreasonable and that its petition should be dismissed.

EUGENE M. FOLEY,
Attorney, W. T. Grant Company.

February, 1952.

* The Board, in effect, holds that respondent’s views regarding compulsory union membership demonstrated that it would not approach the bargaining table with an open mind—that its conduct was not that of one seeking agreement. One might ask: does the Board require unions to hold no fixed views with regard to the union shop? In any case, an open mind “need not mean a mind without conviction nor need it mean a mind easily swayed by argument” (*American National Ins. Co., v. N. L. R. B.*, 187 F. 2d 307, footnote at p. 309).

Appendix.

The Relevant Statute

“Who May File Petitions—Elections by Secret Ballot” Section 9 (c) (1)

as it is written

“Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

- (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the

as the Board construes it

Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

- (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), * * *

the Board may investigate such petition and may provide for an appropriate hearing on due notice. The Board may also direct an election by secret ballot; but if the petition be supported by authorization cards signed by more than 50% of the employees in an appropriate unit, such authorization cards shall be deemed conclusive evidence

Appendix.

Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. * * *

of representation and no election need be held. The Board in such case may direct the employer to bargain with the representative named in such cards notwithstanding any direction of election that might have theretofore been made by the Board.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board."

(4) It shall be the employer's burden to determine, without interrogating his employees, or otherwise violating this Act, whether more than 50% of his employees have freely chosen the representative designated in authorization cards and in the absence of a showing by the employer that such designations were procured through coercive methods or misrepresentation, nothing in this section shall be construed as relieving him from the obligation of bargaining on demand with such representative.



No. 13135

**United States
Court of Appeals**
for the Ninth Circuit.

WATERMAN STEAMSHIP CORPORATION, a
Corporation,

Appellant,

vs.

SHIPOWNERS & MERCHANTS TOWBOAT,
CO., LTD., a Corporation, and TUG SEA
FOX, INC., a Corporation, on Their Own Be-
half and on Behalf of the Master, Officers and
Crew of the Tug Sea Fox,

Appellees.

Apostles on Appeal

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

JAN - 9 1952

PAUL P. O'BRIEN

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

CLERK



**United States
Court of Appeals**
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and Appellees.



In the Southern Division of the United States
District Court for the Northern District of
California

In Admiralty—No. 25539-E

SHIPOWNERS & MERCHANTS TOWBOAT
CO., LTD, a Corporation, on Its Own Behalf
and on Behalf of the Master, Officers and Crew
of the Tug Sea Fox,

Libelants,

vs.

WATERMAN STEAMSHIP CORPORATION, a
Corporation,

Respondent.

LIBEL FOR SALVAGE

To the Honorable the Judges of the Above-Entitled
Court:

The libel of Shipowners & Merchants Towboat
Co., Ltd., a corporation, owner pro hac vice of the
diesel tug Sea Fox, and on behalf of her master,
officers and crew, against Waterman Steamship
Corporation, a corporation, owner of the American
steamer Herald of the Morning, in a cause of sal-
vage, civil and maritime, alleges:

I.

That libelant is a corporation organized and
existing under and by virtue of the laws of the
State of California; libelant, at all times herein

mentioned, was and now is the demise charterer and operator of the tug Sea Fox and as such the chartered owner thereof; said Sea Fox is a diesel tug with the length of 126 feet overall, a beam of 28 feet, a depth of 14½ feet, and a rated horsepower of 1,200; said tug at all times herein mentioned had a master, officers and crew, in all making a complement of 12 men.

II.

That respondent, Waterman Steamship Corporation, is a corporation organized and existing under and by virtue of the laws of the State of Alabama, with a place of business in the City and County of San Francisco, State of California; that said respondent is, and ever since noon of the 8th day of November, 1948, has been the owner of the American steamer Herald of the Morning, now known as the Citrus Packer; said steamer, which at all times herein mentioned was without cargo, was of 10,500 tons deadweight and was known as a C-2 type vessel; at all times herein mentioned said steamer was a dead ship without power of propulsion or any power to handle her anchors, gear, equipment or towing hawser; she had a single anchor available for use until it was lost as hereinafter alleged; her draft at all times herein mentioned was 9 feet forward and 12 feet aft.

III.

That on or about November 1, 1948, libellant was engaged to furnish either the tug Sea Prince or

the tug Sea Fox and use its best efforts to tow the Herald of the Morning from San Francisco Bay to Everett, Washington, where she was to be repaired and placed in operating condition; thereafter libelant furnished said tug Sea Fox and on November 5, 1948, her steel towing hawser was shackled onto the starboard anchor chain of the Herald of the Morning and with the assistance of the tug Sea Wolf departed from Moores Shipyard, Oakland, with said steamer in tow; while at sea on November 6, 1948, wind and seas increased, the tow was shearing and she eventually fell off into the trough of the sea; wind and seas continued to increase and the swell became heavy; the tug was pitching heavily and both vessels were making sternway in the adverse conditions; on the afternoon of November 7, 1948, the tug's steel towing hawser parted and thereafter the tug placed its spare steel hawser on her towing winch and endeavored to pass it to the tow, but the men on the tow were unable to shackle it onto the tow's anchor chain and the tug stood by the drifting vessel throughout the night; on the early morning of November 8, 1948, the second steel hawser was passed to the tow, but in paying it out on the tug it fouled on the towing drum so that the tug could not proceed safely with the tow to Drakes Bay as a place of safety; being informed of the situation libelant dispatched the tug Sea Prince, of which it was the owner pro hac vice, from San Francisco to the scene; about 3:30 p.m. said tug Sea Prince arrived, the tug Sea Fox

burned her wire clear of the towing machine and the tug Sea Prince took the tow into Drakes Bay, where both tugs and tow arrived about 7:30 p.m. on November 8, 1948; in Drakes Bay the steel towing hawser of the tug Sea Prince was shackled onto the starboard anchor chain of the tow and it was thereafter passed to the Sea Fox and there made fast on the towing drum and preparations made to resume the voyage; the Sea Fox with the Herald of the Morning in tow, departed from Drakes Bay about midnight and the tug Sea Prince returned to San Francisco; on November 11, 1948, strong winds, heavy seas and swells were encountered and they progressively increased and continued until November 14th, when the conditions got much worse and the towing engine clutch on the Sea Fox broke and the towing board was lost; it was found impossible to maintain headway and both vessels were drifting; in these circumstances the Sea Fox radioed the Coast Guard for assistance and at 9:45 p.m. the Coast Guard cutter Balsam arrived and attempted, without success, to get a hawser aboard the Herald of the Morning; during all of this time the Sea Fox held onto the tow at considerable risk to herself, her master, officers and crew; about 11 p.m. the wind decreased somewhat and the Sea Fox made headway with the tow toward the open sea; on November 15, 1948, with the cutter Balsam in the vicinity, the Sea Fox continued under way with the tow, but on the night of that day a whole gale was encountered, accompanied with tremendous

seas, all of which prevented the vessels from making any headway and caused the towing hawser to pay out on the towing winch brakes; later on the 15th, the tug Neptune arrived on the scene and attempted to get a line aboard the tow without success; about midnight the Neptune advised that she would stand by until daybreak; the Sea Fox had great difficulty in keeping out of irons and with the tow was making sternway in large and heavy seas; the same adverse conditions continued on November 16th and it was found impossible to control the tow; said adverse conditions caused the steel towing hawser to part during the early morning of the 16th and the helpless tow drifted off into the night; the Sea Fox, Neptune and cutter Balsam kept following the drifting tow and along about daylight, with a gale still blowing and in tremendous seas, every effort was made to get a line aboard the tow; the Neptune eventually succeeded in getting a line aboard the tow, but the crew of the tow could not handle it or make it secure; the Neptune continued her efforts and in so doing was thrown against the stem of the tow and mortally wounded, as a result of which she thereafter sank and became a total loss; in the meantime, the Herald of the Morning was drifting inshore rapidly and the cutter Balsam got a manila hawser aboard the drifting vessel, but it soon parted; during this interval the Sea Fox was standing by the wounded Neptune, pursuant to orders of the master of the cutter Balsam, and after the men aboard the sinking Neptune were rescued and

placed aboard the Balsam by means of rubber life-boats, the Sea Fox set out to rescue the drifting Herald of the Morning; she arrived in the vicinity of the helpless steamer about 6:45 p.m. on the 16th and found her in shoaling water rapidly drifting toward the beach; the master of the Sea Fox ordered the master of the Herald of the Morning to let go his port and only anchor and pay out 8 shots of chain; after considerable delay those on the Herald of the Morning followed said advice and let go said anchor in about 35 fathoms; the steamer continued to drift shoreward quite a distance, dragging her anchor and chain, but she eventually fetched up; the Sea Fox attempted to get a hawser aboard the steamer, but was unable to do so in the prevailing conditions, so she stood by throughout the night of the 16th; on the early morning of November 17th wind and sea commenced to moderate and the Coast Guard cutter Winona arrived on the scene and in due course succeeded in passing a 12-inch manila hawser to the Herald of the Morning, the other end of which was passed to the Sea Fox, after which the Sea Fox steamed slowly ahead, keeping a strain on said hawser and relieving the strain on the steamer's anchor gear; at this time the Herald of the Morning was lying off Willapa Harbor, Washington; on the early morning of November 18th, the tug Hercules arrived on the scene and attempted to get her steel towing hawser aboard the Herald of the Morning; the Hercules eventually got her hawser aboard said steamer and it became necessary to burn off the

latter's port anchor chain, thereby leaving her without a useable anchor and utterly helpless except for the assistance of the rescuing vessels then in the vicinity; in due course the Sea Fox got under way with the Herald of the Morning in tow by means of a 12-inch manila hawser, in company with the tug Hercules which had a steel hawser made fast to said tow; and they towed said Herald of the Morning to Everett, Washington, where said tow was safely delivered on or about 9:45 p.m. on November 19, 1948; while en route with said tow gales and rough seas were encountered and difficulty was experienced by reason thereof and because of the position of the tow's rudder; the Sea Fox suffered the loss of two steel hawsers of the value of \$5,057.00, and in rendering said service she suffered structural damage which was repaired at a cost of \$2,340.00.

IV.

Upon information and belief, alleges that the salved value of said Herald of the Morning on November 20, 1948, was approximately \$400,000; that the services rendered by the tug Sea Fox and the libelants commencing on November 16, 1948, and ending on the night of November 19, 1948, was salvage service of a high order of merit; they were efficiently and skillfully performed under very trying and difficult conditions and while said steamer was in grave danger; that by reason of the premises, libelants are entitled to a liberal award in such amount as may seem meet and just in the premises,

together with all charges, losses and expenses attending the same.

V.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelants pray that process in due form of law according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against said respondent and that it be cited to appear and answer under oath all and singular the matters aforesaid, and that this Honorable Court may be pleased to decree to libelant and the master, officers and crew of said tug Sea Fox a liberal salvage award, and that they may have such other and further relief as in law and justice they may be entitled to receive.

/s/ JOSEPH B. McKEON,
McKEON & COLBY,
Proctors for Libelants.

State of California,
City and County of San Francisco—ss.

Ross L. Perkins, being first duly sworn, deposes and says:

That he is an officer, to wit, the Secretary, of Shipowners & Merchants Towboat Co., Ltd., a corporation, one of the libelants herein, and makes this verification on its behalf; that he has read the foregoing libel for salvage, knows the contents

thereof, and that the same is true to the best of his knowledge, information and belief.

/s/ ROSS L. PERKINS.

Subscribed and sworn to before me this 31st day of October, 1949.

[Seal] /s/ DINAH NEWENBURG,
Notary Public.

My Commission expires January 3, 1951.

[Endorsed]: Filed October 31, 1949.

[Title of District Court and Cause.]

ANSWER TO LIBEL FOR SALVAGE

To the Honorable, the Judges of the Above-Entitled Court:

The answer of Waterman Steamship Corporation, a corporation, respondent, to the libel of Shipowners & Merchants Towboat Co., Ltd., a corporation, owner pro hac vice of the diesel Tug Sea Fox and on behalf of her master, officers and crew in a cause for salvage, civil and maritime, admits, denies and alleges as follows:

I.

Answering unto Article I thereof alleges it has no knowledge or information concerning the allegations therein set forth and calls for strict proof thereof if relevant.

II.

Answering unto Article II thereof, admits that Waterman Steamship Corporation is a corporation organized and existing under and by virtue of the laws of the State of Alabama and at the times mentioned in said libel and on and subsequent to November 8, 1948, was and has been the owner of the American Steamer Herald of the Morning. Alleges that Sudden & Christenson, Inc., a corporation, was and is the agent for respondent in the City and County of San Francisco, State of California. Denies that said respondent has or maintains a place of business in the City and County of San Francisco, State of California. Alleges that said vessel SS Herald of the Morning was a United States Maritime Commission C-2 type vessel of 6214 gross tons, 3508 net tons and 8663 deadweight tons, 435 feet overall length, 63 feet beam and 40 feet 6 inches molded depth. Admits that said vessel was a dead ship without power of propulsion. Alleges that her draft at all times mentioned in said libel was 8 ft. 11in. forward and 17 ft. 3 in. aft. Denies each and all the allegations therein set forth and not herein admitted.

III.

Answering unto Article III thereof, alleges that on November 1, 1948, libelants contracted with Everett Pacific Shipbuilding & Drydock Co. to furnish either the Tug Sea Prince or the Tug Sea Fox and use its best efforts to tow the said SS Herald of the Morning from San Francisco Bay

to Everett, Washington. Thereafter libelants furnished said Tug Sea Fox and on November 5, 1948, her steel towing hawser was shackled on to the starboard anchor chain of the Herald of the Morning, and with the assistance of the Tug Sea Wolf departed from Moore Shipyard, Oakland, with said steamer in tow. Admits that the steel towing hawser of the Tug Sea Fox parted on the afternoon of November 7, 1948. Admits that the Tug Sea Prince arrived in the vicinity of the Herald of the Morning on the afternoon of November 8, 1948, and towed the Herald of the Morning into Drake's Bay, where they arrived on the evening of November 8, 1948. Admits that in Drake's Bay the steel towing hawser of the Tug Sea Prince shackled onto the starboard anchor chain of the tow, and it was thereafter passed to the Sea Fox and thereafter made fast on the towing drum and preparation made to resume the voyage. Admits that the Sea Fox with the Herald of the Morning in tow departed from Drake's Bay about midnight. Admits that the Coast Guard cutter Balsam arrived in the vicinity of the Herald of the Morning on the evening of November 14, 1948, and that said Coast Guard cutter Balsam remained in the vicinity of the Herald of the Morning as alleged in said libel. Admits that the Tug Neptune arrived in the vicinity of the Herald of the Morning at about 2200 on the evening of November 15 and admits that at about 0920 on November 16, 1948, the Tug Neptune, when endeavoring to put a line aboard the Herald of the Morning and solely by reason of the negli-

gence of the Tug Neptune in maneuvering too close to the stem of the Herald of the Morning, was thrown against the stem of the Herald of the Morning, as a result of which she thereafter sank and became a total loss. Alleges that at 1930 on November 16, 1948, the Herald of the Morning dropped her port anchor with slightly more than seven shots of chain, where she continued to lie safely at anchor until 11:15 a.m. on November 18, 1948, when, in tow of the Tug Sea Fox and the Tug Hercules, which latter tug arrived on the morning of November 18, 1948, the Herald of the Morning proceeded on her voyage to Everett, Washington, where she arrived on or about 9:45 p.m. on November 19, 1948. Denies each and all the allegations set forth therein and not herein admitted.

IV.

Answering unto Article IV thereof, alleges that the value of the said Herald of the Morning on November 20, 1948, was approximately \$350,000. Denies each and every, all and singular, the remaining allegations therein contained.

V.

Answering unto Article V thereof, admits that all and singular the premises are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court, except as hereinbefore admitted; denies that all and singular or all or singular the premises are true.

Wherefore, respondent prays that libelants take nothing by reason of their libel on file herein for

respondent's costs of suit herein incurred and for such other and further relief as may be proper in the premises.

/s/ CLARENCE G. MORSE,
GRAHAM & MORSE,
Proctors for Respondent.

State of California,
City and County of San Francisco—ss.

F. C. Lawler, being first duly sworn, deposes and says:

That he is an officer, to wit, Secretary, of Sudden & Christenson, Inc., duly authorized agent of Waterman Steamship Corporation, respondent in the above-captioned matter, and as such is authorized and empowered to make and subscribe oaths sworn on behalf of the respondent; that he has read the foregoing Answer to Libel for Salvage, knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

/s/ F. C. LAWLER.

Subscribed and sworn to before me this 20th day of January, 1950.

[Seal] /s/ LUCIE M. REINCKE,
Notary Public.

My Commission expires November 19, 1950.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 20, 1950.

In the Southern Division of the United States
District Court for the Northern District of
California

In Admiralty No. 25539-E

SHIPOWNERS & MERCHANTS TOWBOAT
CO., LTD., a Corporation, on Its Own Behalf
and on Behalf of the Master, Officers and Crew
of the Tug Sea Fox,

Libelants,

vs.

WATERMAN STEAMSHIP CORPORATION, a
Corporation,

Respondent.

WATERMAN STEAMSHIP CORPORATION, a
Corporation,

Cross-Libelant,

vs.

SHIPOWNERS & MERCHANTS TOWBOAT
CO., LTD., a Corporation,

Cross-Respondent.

CROSS LIBEL FOR DAMAGES

To the Honorable, the Judges of the Above-Entitled
Court:

The cross-libel of Waterman Steamship Corpora-
tion, a corporation, against Shipowners & Mer-

chants Towboat Co., Ltd., a corporation, in a cause of damage, civil and maritime, alleges:

I.

That cross-libelant (hereinafter called Waterman) is a corporation duly organized and existing under and by virtue of the laws of the State of Alabama. That at all pertinent times and on and subsequent to November 8, 1948, cross-libelant was and is the owner of the American steamer Herald of the Morning; that the said SS Herald of the Morning is a United States Maritime Commission C-2 type vessel of 6,214 gross tons, 3508 net tons and 8663 dead-weight tons, 435 feet overall lengths, 63 feet beam and 40 feet 6 inches molded depth. That at all pertinent times said vessel was a dead ship without power of propulsion and her draft at all pertinent times was 8 feet 11 inches forward and 17 feet 3 inches aft.

II.

That cross-respondent (hereinafter called Ship-owners) is a corporation organized and existing under and by virtue of the laws of the State of California, and at all pertinent times was and is the demise charterer and operator of the Tug Sea Fox; that said Sea Fox is a diesel tug with a length of 126 feet overall, a beam of 28 feet, a depth of 14½ feet and a rated horsepower of 1200.

III.

That under and pursuant to Contract No. MCc-61004, Waterman contracted to purchase the

SS Herald of the Morning from the United States Maritime Commission on an "as-is" basis, the vessel then being located at the 16th Street Pier, WAA Plant, Oakland, California. Subsequently to contracting to purchase the said vessel, the said United States Maritime Commission on behalf of Waterman entered into a contract for the reconversion of the said vessel, being Contract No. MCc-61461, with Pacific Car & Foundry Company doing business as Everett Pacific Shipbuilding and Drydock Company (hereinafter called Everett-Pacific). Under and pursuant to the terms and provisions of said contract for reconversion, Everett-Pacific, acting as an independent contractor and not as agent, agreed to transfer or cause the vessel to be transferred from Oakland, California, to the plant of Everett-Pacific located at Everett, Washington. Thereafter the said vessel was delivered by the United States Maritime Commission and Waterman to Everett-Pacific at Oakland, California, and the said Everett-Pacific employed cross-respondent to tow the said SS Herald of the Morning from Oakland, California, to Everett, Washington. That the tow of the said Herald of the Morning from Oakland, California to Everett, Washington, commenced on or about November 5, 1948, the vessel departing in tow of the tug Sea Fox, then owned and/or chartered by cross-respondent. While at sea on November 6, 1948, the wind picked up to a maximum of force northwest 6, continuing on through November 7, 1948. At 1450, November 7, 1948, the towing wire

of the tug Sea Fox broke and although attempts were made to again put a line from the Herald of the Morning to the tug Sea Fox, this was unsuccessful until 0955 on November 8, in the meantime the weather having moderated to wind force northwest 2. In the meantime the cross-respondent had dispatched the tug Sea Prince from San Francisco to the scene, and on the afternoon of November 8, 1948, the tug Sea Prince towed the Herald of the Morning back to Drake's Bay. In Drake's Bay the steel towing hawser of the tug Sea Prince was shackled onto the starboard anchor chain of the tow, and it was thereafter passed to the Sea Fox and there made fast on the towing drum and preparations made to resume the voyage. The Sea Fox with the Herald of the Morning departed from Drake's Bay about 0100 on November 9th. Thereafter no untoward events occurred until November 14th, when the towing engine clutch on the Sea Fox broke and the towing board was lost. At that time the Sea Fox radioed for assistance and at 2145 on November 14th the Coast Guard Cutter Balsam arrived. The Coast Guard Cutter Balsam remained in attendance throughout November 14th, and on November 15th the tug Neptune arrived at the scene to render assistance. In the early morning of November 16th the towing wire of the tug Sea Fox broke and the Herald of the Morning was thereafter helpless and adrift. On November 16th the tug Neptune, while attempting to get a line aboard the Herald of the Morning and solely be-

cause of the negligent maneuvering of the Neptune, came into collision with the stem of the Herald of the Morning and shortly thereafter the Neptune sank and became a total loss. At about 1830 on November 16th, the Herald of the Morning having drifted into shoaling water, dropped her port anchor and let out a little over seven shots of chain; thereafter the vessel continued to ride safely at anchor until November 17th, when a line was made fast from the tug Sea Fox, and by 0930 on November 18th a line was also made fast from the tug Hercules, which had arrived in the vicinity earlier that morning. Having no means of raising the port anchor, it was necessary to cut the chain with the use of an emergency cutting outfit borrowed from the Coast Guard Cutter Balsam; and thereafter on November 18, 1948, at 1115, the Herald of the Morning, in tow of the tugs Sea Fox and Hercules, proceeded on her voyage toward Everett, Washington, where she arrived at 2145 hours on November 19, 1948.

IV.

That by reason of the foregoing matters and things, suit has been filed in the United States District Court for the Northern District of California, Southern Division, by Puget Sound Tug & Barge Company, a corporation, and Cary-Davis Tug & Barge Company, a corporation, against Waterman Steamship Corporation, No. 25538-H in the files of the Clerk of said Court, wherein and whereby Puget Sound Tug & Barge Company as owner pro

hac vice of the tug Hercules, and Cary-Davis Tug & Barge Company as owner of said tug Hercules, and on behalf of her master, officers and crew, seek to recover "a liberal award" for salvage services "in such amount as may seem meet and just in the premises, together with all charges and expenses attending the same."

V.

That as a result of said towing operation and by reason of the loss of the port anchor and anchor chain of the Herald of the Morning, and by reason of the loss of and damage to the starboard anchor chain, as well as other damages done to the Herald of the Morning during said towage period, Waterman has suffered damages in the amount of \$17,994.00; that although Waterman has made demand upon Shipowners to pay said sum, Shipowners has refused and now refuses to pay said sum or any part thereof, and the whole thereof is now due, owing, payable and unpaid.

VI.

That Shipowners was negligent in the premises in the following respects among others:

(1) That the tug Sea Fox was insufficiently powered and inadequately and defectively equipped for the towage of the Herald of the Morning from Oakland, California, to Everett, Washington, at that time and season of the year.

(2) That the said tug Sea Fox was unseaworthy

in that she was manned with inefficient, careless and negligent master, officers and crew.

(3) That Shipowners was negligent and careless in other and further particulars of which Waterman is not now informed, but when so informed will beg leave to amend this cross-libel if it be so advised.

VII.

That by reason of the premises, Shipowners is liable to Waterman for all loss or damage suffered by Waterman as a result of the claim for salvage hereinbefore referred to in Article IV hereof, as well as counsel fees and costs of suit incurred by Waterman in defense of such litigation. Furthermore, that said Shipowners is liable to Waterman for all loss and damage suffered by Waterman during the tow of said Herald of the Morning hereinbefore referred to in Article V hereof.

VIII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, cross-libelant prays that process in due form of law according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the said Shipowners & Merchants Towboat Co., Ltd., a corporation, and that it be cited to appear and answer under oath all and singular the matters aforesaid, and that this Honorable Court may be pleased to decree to cross-libelant its damages as herein set forth, and that it may have such other and further

relief as in law and justice it may be entitled to receive.

/s/ CLARENCE G. MORSE,

GRAHAM & MORSE,

Proctors for Cross-Libelant.

State of California,

City and County of San Francisco—ss.

F. C. Lawler, being first duly sworn, deposes and says:

That he is an officer, to wit, Secretary, of Sudden & Christenson, Inc., duly authorized agent of Waterman Steamship Corporation, cross-libelant in the above-captioned matter, and as such is authorized and empowered to make and subscribe oaths sworn on behalf of the cross-libelant; that he has read the foregoing Cross-Libel and knows the same to be true and correct, except as to those matters which are therein stated upon information or belief, and as to those matters he believes the same to be true.

/s/ F. C. LAWLER.

Subscribed and sworn to before me this 20th day of January, 1950.

[Seal] /s/ LUCIE M. REINCKE,
Notary Public.

My Commission Expires November 19, 1950.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 20, 1950.

[Title of District Court and Cause.]

ANSWER OF SHIPOWNERS & MERCHANTS
TOWBOAT CO., LTD., TO CROSS-LIBEL

To the Honorable, The Judges of the Above-entitled
Court:

The answer of Shipowners & Merchants Towboat Co., Ltd., to the cross-libel of Waterman Steamship Corporation on file herein, denies, admits and alleges as follows:

I.

Admits the allegations of Articles I and II of said cross-libel.

II.

Alleges that it is without information or belief sufficient to enable it to answer the allegations of said article beginning with the word "That" on line 26, page 2, down to and including the word "California" on line 13, page 3, thereof; wherefore it calls for proof thereof if material; denies that no untoward event occurred between November 9th, and November 14th, 1948; denies that the Tug Neptune at the time therein alleged came into collision with the stem of the Herald of the Morning by reason of the or any negligence of the Tug Neptune or the or any negligent maneuvers on the part of those in charge of the Tug Neptune; denies that the Herald of the Morning rode safely at anchor after dropping her port anchor as therein alleged; except as herein denied admits the allegations of said article.

III.

Admits the allegations of Article IV of said cross-libel.

IV.

Answering unto the allegations of Article V of said cross-libel, denies each and every, all and singular, the allegations of said article except that it admits the refusal to pay said or any sum to cross-libelant.

V.

Denies each and every, all and singular, the allegations of Article VI of said cross-libel.

VI.

Denies each and every, all and singular, the allegations of Article VII of said cross-libel.

VII.

Except as herein admitted, denies that all or singular the premises set forth in said cross-libel are true.

And by way of an affirmative answer to said cross-libel, cross-respondent alleges:

I.

That in the towage contract referred to in said cross-libel it was agreed that Everett Pacific Shipbuilding & Drydock Company, would make up the tow and cause it to be in all respects sufficient and fit to make the voyage and withstand the perils to be encountered thereon and that it would direct

and be responsible for the method and position in which the tow should be towed and the determination of the time of sailing and that it would man, supply and maintain thereon proper navigation lights and towing gear and make tow lines fast thereon and that this cross-respondent would not be required to make any inspection of the tow before commencing the towage service.

II.

Cross-respondent is informed and believes and upon that ground alleges that said tow the *Herald of the Morning* was insured against marine perils including salvage during the voyage referred to in said cross libel and that as a condition of the attachment of said risk the hull underwriters on said tow required said tow and the towing tug to be passed upon and approved by, and satisfactory to, a surveyor to the Board of Marine Underwriters of San Francisco, or a surveyor to the United States Salvage Association; that a surveyor to both of said organizations was so employed and that he in due course passed upon and approved as satisfactory said tow and tug for the voyage aforesaid.

III.

That in said towage agreement it was further agreed that this cross-respondent would be made an additional assured in the hull policies on said tow and that it would have the benefit of such insurance and that hull underwriters would waive any right of subrogation against it. Upon informa-

tion and belief, cross-respondent alleged that it, together with Waterman Steamship Corporation and Everett Pacific Shipbuilding & Drydock Company, was and is a party insured by said policies and that said hull underwriters have waived subrogation against it.

IV.

That the defense of the libel herein and the prosecution of the cross libel herein in the name of respondent Waterman Steamship Corporation is in fact for and on behalf of said hull underwriters.

Wherefore, cross-respondent prays that said cross-libel be dismissed with costs.

/s/ JOSEPH B. McKEON,

McKEON & COLBY,

Proctors for Cross-
Respondent.

State of California,

City and County of San Francisco—ss.

Ross L. Perkins, being first duly sworn, deposes and says:

That he is an officer, to wit, the Secretary, of Shipowners & Merchants Towboat Co., Ltd., a corporation, one of the libelants herein, and makes this verification on its behalf; that he has read the foregoing answer to cross-libel, knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

/s/ ROSS L. PERKINS.

Subscribed and sworn to before me this 24th day of March, 1950.

[Seal] /s/ LUCIE M. REINCKE,
Notary Public.

My commission expires November 19, 1950.

Interrogatories Propounded to Respondent and
Cross-Libelant Waterman Steamship Corpora-
tion, Which It Is Required to Answer Under
Oath

1. Please state each respect or particular in which the Tug Sea Fox was inadequately or defectively equipped as alleged in subdivision 1 of Article VI of the cross-libel.

2. Please state each respect or particular in which each of the master, officers and crew of the Tug Sea Fox was inefficient, careless or negligent as alleged in subdivision 2 of Article IV of the cross-libel.

3. Who selected and determined the date and the time for the departure of the Herald of the Morning from Oakland, California, on the voyage referred to in the cross-libel.

4. Describe each respect or particular in which the Tug Neptune was negligently maneuvered as alleged in Article III of said cross-libel.

5. Was the Herald of the Morning insured on

the voyage referred to in the cross-libel against marine risks including salvage?

6. If you answer the last preceding interrogatory in the affirmative, please name the parties who were insured by such insurance.

7. Is it not a fact that a surveyor to the Board of Marine Underwriters of San Francisco, and the United States Salvage Association, for and on behalf of underwriters of the Herald of the Morning, passed upon and approved as satisfactory the tug and tow for the voyage mentioned in the cross-libel?

/s/ JOSEPH B. McKEON,

McKEON & COLBY,

Proctors for Cross-
Respondent.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 27, 1950.

[Title of District Court and Cause.]

AMENDMENT TO LIBEL

Comes now Shipowners & Merchants Towboat Co., Ltd., a corporation, and amends its libel on file herein in the following respects:

1.

Strike out the last sentence of Article 1 com-

mencing with the words "said Tug" on line 3, page 2, thereof, and add in lieu thereof the following:

"The master, officers and crew of said Tug Sea Fox, appearing for their own interests herein, at all times herein mentioned were: Rudolph T. Sommer, James Reichel, Charles J. Harris, Gysbert Oliemans, Friedrich J. Ruyters, Cornielis Vanderboon, Theodore Slowikow, Charles J. Olsen, Arthur V. Joudrey, Giocondo Ceccato, William Schmidt and Jerry M. Delmas."

/s/ JOSEPH B. McKEON,

McKEON & COLBY,

Proctors for Libelants.

It is stipulated that verification to the foregoing amendment is waived and that said amendment may be filed herein.

GRAHAM & MORSE,

/s/ CLARENCE G. MORSE,

Proctors for Respondent.

[Endorsed]: Filed October 5, 1950.

[Title of District Court and Cause.]

AMENDMENT TO ANSWER TO LIBEL
FOR SALVAGE

To the Honorable, The Judges of the Above-entitled
Court:

The answer of Waterman Steamship Corporation, a corporation, respondent, to the libel of Shipowners & Merchants Towboat Co., Ltd., a corporation, owner pro haec vice of the Diesel Tug Sea Fox, and on behalf of her master, officers and crew in a cause for salvage, civil and maritime, admits, denies and alleges as follows:

I.

Answering unto Article I thereof as amended by said Amendment to Libel, alleges it has no knowledge or information concerning the allegations therein set forth and calls for strict proof thereof if relevant.

II.

Realleges and reasserts each and all of the remaining allegations of the Answer to Libel for Salvage heretofore filed herein.

Wherefore, respondent prays that libelants take nothing by reason of their libel and amendment to libel on file herein, for respondent's cross-suit herein incurred and for such other and further relief as may be proper in the premises.

GRAHAM & MORSE,
/s/ CLARENCE G. MORSE,
Proctors for Respondent and
Cross-Libelant.

It is stipulated that verification to the foregoing amendment is waived and that said amendment may be filed herein.

/s/ JOSEPH B. McKEON,
McKEON & COLBY,
Proctors for Libelants.

[Endorsed]: Filed November 15, 1950.

[Title of District Court and Cause.]

AMENDMENT TO ANSWER OF SHIP-
OWNERS & MERCHANTS TOWBOAT CO.,
LTD., TO CROSS-LIBEL AND INTER-
ROGATORIES PROPOUNDED TO CROSS-
LIBELANT

Comes now Shipowners & Merchants Towboat Co., Ltd., a corporation, and amends its answer to the cross-libel on file herein in the following respects:

I.

Add to page 4 thereof before the prayer the following:

And by way of a second affirmative defense to said cross-libel, cross-respondent alleges:

1.

Cross-respondent is informed and believes and upon that ground alleges that cross-libelant and

Everett Pacific Shipbuilding & Drydock Company and the United States of America were expressly named as assureds in a marine policy of insurance on the hull of the *Herald of the Morning* at all times mentioned in the libel on file herein; that said policy insured against marine perils including salvage during the voyage referred to in said cross-libel and that the cost of such insurance was for the account of cross-libelant; that cross-libelant and Everett Pacific Shipbuilding & Drydock Company, before issuance of said policy of insurance and the commencement of said voyage, had entered into an agreement whereby Everett Pacific Shipbuilding & Drydock Company was relieved from any liability for loss of or damage to said vessel during said voyage; that it was understood and agreed between said parties that they would look only to said insurance policy for any loss of or damage to said vessel during said voyage and that Everett Pacific Shipbuilding & Drydock Company would enter into a towage contract with a tugboat company containing a provision extending to the tugboat company by way of waiver of subrogation, or otherwise, the full benefit of said policy of insurance; that pursuant to such understanding and agreement and with the consent of cross-libelant and the knowledge of the insurers issuing said policy, said Everett Pacific Shipbuilding & Drydock Company, on its own behalf and for the benefit of cross-libelant, entered into a towage contract with cross-respondent which expressly extended to cross-respondent the full benefit of said policy of insurance;

that said towage contract was signed by Sudden & Christenson, Inc., as agent for Everett Pacific Shipbuilding & Drydock Company and that said Sudden & Christenson, Inc., also was the Pacific Coast Agent for said cross-libelant; that said policy of insurance expressly fixed an additional premium for the waiver of subrogation against cross-respondent and the extension of the benefit of said insurance to it; that cross-libelant was obligated to pay said additional premium and cross-respondent on information and belief alleges that said additional premium was paid to the insurers issuing said policy of insurance, the benefit of which respondent hereby claims.

/s/ JOSEPH B. McKEON,
McKEON & COLBY,
Proctors for Libelants.

It is stipulated that verification to the foregoing amendment is waived and that said amendment may be filed herein.

GRAHAM & MORSE,
/s/ CLARENCE G. MORSE,
Proctors for Respondent.

Interrogatories Propounded to Cross-Libelant Waterman Steamship Corporation Which It is Required to Answer Under Oath

1. Is it not a fact that the policy of insurance on the Herald of the Morning on the voyage

referred to in the cross-libel provided for the payment of an additional premium for the release of cross-respondent's towing tug from liability for any loss of or damage to the *Herald of the Morning* on said voyage or for the waiver of subrogation by the insurers against cross-respondent and its tug?

2. If you answer the preceding interrogatory in the affirmative, please state whether or not said additional premium for such release or waiver of subrogation has been paid to the insurers insuring the *Herald of the Morning* on the voyage referred to in the cross-libel.

3. If said premium has not been paid, please state whether or not it is owing to the insurers or whether or not any arrangement has been made for its payment to them at any future time.

4. Did you enter into an agreement with Everett Pacific Shipbuilding & Drydock Company relieving the latter from liability for any loss of or damage to the *Herald of the Morning* during the voyage referred to in the cross-libel?

5. Is it not a fact that before the commencement of the voyage referred to in the cross-libel Everett Pacific Shipbuilding & Drydock Company had entered into a towage contract with cross-respondent which expressly provided that cross-respondent would directly or indirectly have the benefit of the insurance on the *Herald of the Morning* on said voyage either by way of a waiver of subrogation against it, or otherwise?

6. Was it understood and agreed between you and Everett Pacific Shipbuilding & Drydock Company that the cost of the insurance on the *Herald on the Morning* on said voyage would be for your account?

7. Is it not a fact that the contents of the towage contract between Everett Pacific Shipbuilding & Drydock Company and cross-respondent were made known to the insurers issuing said policy of insurance or their agents or representatives before said voyage commenced?

8. Is it not true that before said policy was issued you or your representatives gave a full disclosure to said insurers of the arrangements made regarding, and the terms and conditions of, the contract for the towage of the *Herald of the Morning* on the voyage referred to in the cross-libel.

/s/ JOSEPH B. McKEON,
McKEON & COLBY,
Proctors for Cross-
Respondent.

[Endorsed]: Filed December 6, 1950.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 25538

PUGET SOUND TUG & BARGE COMPANY
a Corporation; and CARY-DAVIS TUG &
BARGE COMPANY, a Corporation,

Libelants,

vs.

WATERMAN STEAMSHIP CORPORATION, a
Corporation,

Respondent.

No. 25539

SHIPOWNERS & MERCHANTS TOWBOAT
CO., LTD., a Corporation, on Its Own Behalf
and on Behalf of the Master, Officers and Crew
of the Tug Sea Fox,

Libelants,

vs.

WATERMAN STEAMSHIP CORPORATION, a
Corporation,

Respondent.

Actions seeking to recover award for salvage of
respondent's vessel. Judgment in accordance with
opinion.

Joseph B. McKeon and McKeon & Colby, all of
San Francisco, California, proctors for libelants.

Clarence G. Morse, Francis Tetreault, and Gra-

ham & Morse, all of San Francisco, California, proctors for respondent.

MEMORANDUM OPINION

Roche, Chief Judge:

By these two actions, which were consolidated for trial, the libelants seek to recover an award for the alleged salvage of respondent's vessel, the SS *Herald of the Morning*, by the tugs *Sea Fox*, *Neptune* and *Hercules*.

The litigation grows out of the following facts, as disclosed by the record.

At all pertinent times the respondent Waterman Steamship Corporation (hereinafter called "Waterman") was the owner of the American steamer *Herald of the Morning* (hereinafter called "Herald"), which it had purchased from the United States Maritime Commission for reconversion to a cargo vessel. Subsequent to the contract of purchase, the Maritime Commission on behalf of Waterman entered into a contract for the reconversion of the *Herald* with Pacific Car & Foundry Company doing business as Everett Pacific Shipbuilding and Drydock Company (hereinafter called "Everett-Pacific"), under the terms of which Everett-Pacific agreed to have the vessel transferred from Oakland, California, to its yards at Everett, Washington. Pursuant to this contract provision Everett-Pacific entered into a towage agreement with libelant Shipowners & Merchants Towboat Co., Ltd. (hereinafter called "Shipowners"), as the

chartered owner and operator of the Tug Sea Fox. The Sea Fox is a diesel tug with a length of 126 feet overall, a beam of 28 feet, a depth of 14½ feet and a rated horsepower of 1200. The Herald is a C-2 type vessel of 6,214 gross tons, 3508 net tons and 8663 deadweight tons, 435 feet overall length, 63 feet beam and 40 feet, 6 inches molded depth. At all pertinent times said vessel was a dead ship without power of propulsion, with a draft of 8 feet, 11 inches forward and 17 feet, 3 inches aft.

The towage contract released Shipowners from liability for loss or damage arising from faults or errors in the navigation or management of the tug or tow and it further provided that Shipowners should be named as an additional assured in Everett-Pacific's insurance policy covering the tow. If this was not done, Everett-Pacific agreed to assume the risk, including any liability of Shipowners which could be covered by insurance. It does not appear from the record that Shipowners was so named.

The Herald was covered by a policy of insurance which included salvage among other risks and in which Waterman and Everett-Pacific were the named assureds. The policy recited the towing tug's release from liability and the consequent charge of a higher premium rate, which was paid. Another provision required that the vessel, tug and all towing arrangements be approved by the United States Salvage Association. Such approval was given with the proviso that during the trip advantage should

be taken of favorable weather to the extent possible.

The Herald, carrying a crew of sixteen men, left San Francisco Bay in tow of the Sea Fox on November 5, 1948. She was without cargo, without power to handle any of her gear, and had only her port anchor available for use, the starboard anchor chain having been shackled to the steel towing hawser. This tow wire parted on November 7th and on the following day the Sea Fox succeeded in passing its spare full length tow wire to the Herald. This, however fouled on the winch drum of the tug's towing engine and had to be cut off and dropped into the sea. The fair lead traveler also had to be removed from the winch because of damage. Ship-owners was advised of the situation and sent a second tug, the Sea Prince, which took the Herald in tow. The three vessels put into Drake's Bay where the Sea Prince passed its tow wire to the Sea Fox and on November 9th the tug with the Herald in tow again headed northward.

There was no further mishap until November 13th, although the log of the Sea Fox records some squally weather and the fact that the tow was shearing badly. In this connection it must be remembered that the Herald was a large unloaded ship, riding high in the water, and presenting a perfect target for the wind. During the night of the 13th and on the 14th the tug and tow encountered increasingly heavy weather; the towing board that had been placed on the tug's stern to keep the tow wire from chafing went overboard; the towing en-

gine's gears carried away and emergency measures had to be used to halt the winch drum and thus prevent the tow wire from paying out. A strong wind and heavy seas increased the strain on the line and late on the 14th the Sea Fox radioed for assistance, then headed out to sea to ride out the storm.

The cutter Balsam from the Astoria Coast Guard station reached the scene about eight o'clock that night and the tug Neptune, which was proceeding up the coast to Seattle, arrived the following evening. The Neptune made several unsuccessful attempts to put a line aboard the Herald from the lee side, finally desisting because of the danger that the ship would drift down on her. The storm had increased to a whole gale and early in the morning of November 16th the tow wire between the Sea Fox and the Herald parted, carrying with it the preventer wire which had been attached sometime before in an effort to ease the strain on the towing machine. With no motive power of her own the Herald soon lay broadside to the wind and began to drift in a northeasterly direction toward the shore about forty miles distant.

After daybreak the Neptune again approached the Herald from the lee side but was unable to get in close enough without danger of being run down. She then approached the drifting ship's bow from the windward side and after considerable maneuvering succeeded in picking up a light line attached to life rings thrown from the Herald but the ves-

sel's crew, which had to pull the line in by hand, was unable to lift the steel pendant to which the tow wire was attached over the lip of the ship's chock. The crew continued their efforts for about an hour, during which time the Neptune maneuvered as close as she dared in order to lessen the weight and drag of the steel pendant and hawser. Suddenly a great sea struck the Neptune when her bow was about 75 feet distant from the bow of the Herald and drove her right at the Herald's stem. At the same time the force of the same sea lifted the Herald and when she came down her stem knifed through the starboard side of the Neptune, inflicting a mortal wound. It soon became evident that she could not be saved and orders were given to abandon ship. One of her officers fell overboard and died, apparently from a heart attack. The Balsam took the remaining officers and men on board, then followed the drifting Herald after instructing the tug Sea Fox to stand by the Neptune. The Sea Fox remained with the sinking tug until she went down some five hours later, then proceeded as fast as she could for the Herald. In the meantime the Balsam had got her ten inch manila hawser on the Herald but it soon parted in the storm and the ship continued to drift in toward shore, which it was estimated she would strike about midnight.

By the time the Sea Fox reached the Herald she had come into shoal water and the Balsam radioed the tug to instruct the Herald to drop anchor. At first the Herald failed to let out enough chain. The Sea Fox then instructed her to let out

about 9 shots and after this had been done, the anchor apparently held. It was now dark and the attempt of the Sea Fox to shoot a line to the Herald with a Lyle gun failed, the crew evidently missing it in the darkness.

By early morning of the 17th, when the Coast Guard Cutter Winona arrived on the scene, the weather had moderated.

At the suggestion of the Sea Fox, the Winona passed one end of her 12 inch manila hawser to the Herald and the other end to the Sea Fox and the tug then moved out ahead of the anchored ship and kept her engines going ahead in order to ease the strain on the Herald's anchor chain and gear. The Balsam now left the scene to take the Neptune's crew to Astoria, Oregon, but later returned. The Winona remained until after the Tug Hercules, which had been summoned from Seattle, arrived early on the morning of November 18th.

The Hercules passed her tow wire to the Herald. Both tugs were soon in difficulty because in their effort to keep far enough apart to avoid collision they broached broadside to the wind and were carried toward the Herald's stern. During this time the Herald's crew endeavored, unsuccessfully, to slip her anchor and finally had to cut the anchor chain with an acetylene torch borrowed from the Balsam. The Sea Fox and the Hercules succeeded in forging ahead of the Herald and commenced towing her, accompanied by the Balsam. They reached Everett, their destination, on the evening

of November 19th and the Hercules then returned to Seattle, arriving about one o'clock on the morning of the 20th.

The first question for decision is whether the foregoing facts show a case of salvage. If they do, the court must then fix the award and determine the extent to which each vessel is entitled to participate, if at all.

To constitute salvage of a vessel she must be in impending peril of the sea from which she is rescued by the voluntary efforts of others. Whether the Herald was in such peril after her tow wire parted shortly after midnight on November 16th is a question of fact and the court believes that the evidence shows conclusively that she was. Respondent Waterman attempts to minimize the danger by stressing the fact that the ship was able to anchor in shoal water and that her anchor held. The record discloses, however, that during the period when the Herald was being held only by her anchor the weather had moderated and was relatively calm. By the time the wind and seas began to increase in force the Sea Fox had a line on the Herald and by keeping her engines going ahead she materially eased the strain on the Herald's anchor chain. Furthermore, another heavy storm blew up on the night of the 18th and there is credible testimony that the vessel's single anchor probably would not have been sufficient to keep her from being blown ashore where she would have become a total loss. It was only through the efforts of the Sea Fox and the Her-

cules, assisted by the two Coast Guard cutters, that the *Herald* was rescued from her position of peril and towed safely to her destination.

The Court concludes, therefore, that the *Herald* was salvaged and it remains to fix the award and each vessel's proportionate share. "Salvage" is compensation which includes the element of reward for voluntarily performing a meritorious service. It has long been favored by public policy as important to the safety of lives and property at sea. In fixing the amount of the award the court must consider not only the value of the property saved and the degree of danger from which it was rescued but also the value of the salvors' property used in the operation, the risk to which it was exposed, the labor expended by the salvors and the risk incurred by them, and the promptitude, skill and energy displayed in rendering the service.

The record discloses that the *Herald* had a fair market value somewhere between \$1,054,000, the sum for which she was insured for the voyage, and \$375,000 which, it was testified, was the very minimum value that could be placed on her. The three tugs had a combined value of \$400,000. Their respective values, as stipulated, were: *Neptune*, \$150,000; *Sea Fox*, \$125,000; *Hercules*, \$125,000. The service was performed under hazardous conditions. Not only was one tug lost but there is evidence that the men on the *Sea Fox* were frequently in danger of being swept overboard by the heavy seas. That the service was rendered with promptness,

skill and energy is apparent from the facts heretofore recited. In view of all the evidence, therefore, the court estimates that the total salvage should be considered at the sum of \$60,000.00, provided all the salvors who rendered service claimed and were entitled to claim pay for their services. The Coast Guard cutters Winona and Balsam, however, have not claimed, nor are they entitled under the law to claim any pay for their share in the operation. These two Government vessels rendered a substantial contribution which the Court fixes at one-fourth of the salvage service and which must be taken into account in fixing the salvage award. *United States v. Central Wharf Towboard Co.*, 8 F. 2d 250. Therefore the Court fixes the total salvage award at the sum of \$45,000.00, to be divided among the participating tugs in the proportion indicated in the discussion of their respective claims.

Sea Fox

Respondent Waterman resists the claim of the Sea Fox on grounds that may be summarized as (1) the Sea Fox did only what she was bound to do under her towage contract, and (2) any position of danger in which the Herald was placed resulted from the fault of Shipowners and the tug.

Whether a towage contract should be held superseded by the right to salvage depends upon all the facts and circumstances of the particular case viewed in the light of the applicable principles of law. The classic statement of these principles is found in *The Minnehaha*, Lush .335, 15 Eng. Rep.

444, 451, still the leading case on the subject, in which the Privy Council held: "She (the towing vessel) may be prevented from fulfilling her contract by vis major, by accidents which were not contemplated and which may render the fulfilment of her contract impossible; and in such case, by the general rule of law, she is relieved from her obligations. But she does not become relieved from her obligations because unforeseen difficulties occur in the completion of her task; because the performance of the task is interrupted, or cannot be completed in the mode in which it was originally intended, as by the breaking of the ship's hawser. But if in the discharge of this task, by sudden violence of wind or waves, or other accidents, the ship in tow is placed in danger, and the towing-vessel incurs risks and performs duties which were not within the scope of her original engagement, she is entitled to additional remuneration for additional services if the ship be saved, and may claim as a salvor, instead of being restricted to the sum stipulated to be paid for mere towage."

In the instant case the salvage claim is not based on the mere breaking of the tow wire. It is based on the efforts of the *Sea Fox* in pursuing and ultimately rescuing, with assistance, the *Herald* after the ship had been set adrift by the storm and blown into a position of danger. Respondent argues that strong winds and heavy seas are apt to be encountered along the North Pacific coast in the month of November and that, therefore, they must have

been in contemplation of the parties to the towage contract. If this argument were sustained it would mean that a tug would be held strictly to its contract no matter how extraordinary and hazardous its efforts to save its tow imperilled by the violence of wind or waves. The Court does not believe that such a holding would be consonant with maritime policy or with the legal principles set forth above. Accordingly, the Court holds that the facts in this case warrant allowing the *Sea Fox* to claim as a salvor. The only remaining question is whether her claim is barred because of fault or negligence.

Respondent Waterman alleges that the *Sea Fox* was negligent in that her towing equipment was defective; she was carelessly navigated and manned by officers inattentive to their duties; she failed to put into a port of refuge, specifically the Columbia River, after receiving storm warnings; she should not have left Drake's Bay without a full length "insurance" tow wire on board; and she was guilty of statutory fault in that Captain Sommer, her master, did not have an unlimited master's license.

These allegations, save that of statutory fault, involve questions of fact and the court does not find them supported by the record. There is no doubt that the *Sea Fox* did receive storm warnings but there is no testimony that any "port of refuge" was available. On the other hand, four experienced tug masters testified that the weather conditions from November 13th through the 16th were such that it would not have been feasible for the tug to try to

take the Herald across the Columbia River Bar. Under all the circumstances it was but good seamanship for the Sea Fox to head out to sea to try to ride out the storm. Nor does the record disclose in what way having an extra full length tow wire on board would have enabled the Sea Fox to do anything she did not do, since the storm that caused the towwire to part also made it impossible to get any line aboard the Herald.

The allegation of statutory fault involves the question of burden of proof. Respondent Waterman asserts that under the so-called "Pennsylvania Rule" the burden is on the Sea Fox to prove that Captain Sommer's lack of an unlimited master's license not only did not, but could not have contributed to placing the Herald in danger. This rule stems from *The Pennsylvania* (1873) 86 U. S. 125, a collision case in which the Supreme Court stated that the navigation rule violated by one of the vessels was one intended to prevent collisions and hence it was no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. The Court then went on to hold that in such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Since this decision the rule has been applied in a number of cases in which there was an apparent causal connection between the statutory violation and the disaster. See, for example, *The Denali*, 112 F. 2d. 952,

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a 1941 decision of the Court of Appeals for the Ninth Circuit, where the statutory three-watch provision for mates was being violated at the time errors in navigation caused the vessel to be stranded. The Court held that the rule and presumption of the Pennsylvania case controls in libels for injury to sailors or cargo where the vessel has violated the positive command of a safety statute to prevent fatigue in the navigating officer controlling her navigation at the time the navigation caused the injury, whether by colliding with another vessel or with a reef on which she strands. Similar cases are *Belden v. Chase*, 150 U. S. 674 (vessel which sank as the result of a collision had violated certain statutory passing rules); *Material Service*, 1937 A.M.C. 925 (vessel sank after being rendered unseaworthy by the cutting of holes in the hatch covers in violation of certain rules and regulations having the force of statutes); *The Eagle Wing*, 135 F. 826 (collision, the vessel at fault being navigated by an unlicensed mate); *Martin Marine Transportation Co. v. U. S.*, 183 F. 2d. 676 (collision involving barges not carrying a full complement in crews, in violation of certain statutes). The Court has found no application of the rule to a factual situation like the one here presented. Furthermore, the record discloses that the *Sea Fox* was officered by Capt. Reichel and Mate Harris as well as Capt. Sommer. Capt. Reichel had an unlimited master's ocean going license and Mr. Harris, the second mate, had an unlimited chief mate's ocean going license. All three were experienced and competent men.

Assuming, however, that in this case the rule is applicable, the burden of proof has been carried because the evidence clearly shows that the *Herald* was set adrift and carried into a position of danger solely by the violence of the storm.

The Court concludes, therefore, that the *Sea Fox* was free from fault or negligence and is entitled to share in the salvage award to the extent of fifty-five per cent, or the sum of \$24,750.00.

Neptune

Respondent *Waterman* contends that not only did the *Neptune* give no actual assistance to the *Herald* but that she was lost through her own negligence in approaching the ship from the windward side. The record discloses, however, that she attempted repeatedly to come in from the lee side, attempts that were made extremely hazardous by the danger of the *Herald* drifting down on her. Her windward approach was a last resort in her effort to help the drifting vessel. That it ended disastrously was not due to negligence on her part. It resulted from her persistence in attempting to aid the *Herald's* crew in their effort to haul on board the tug's tow wire which she had succeeded in attaching to a messenger line from the ship. Their effort was unsuccessful but through no fault of the *Neptune*.

Ordinarily a vessel can share in a salvage award only if she has contributed to the successful salvage operation. Where, as here, however, a vessel that does so contribute and the vessel whose attempted

contribution has failed belong to the same owner there is, in effect, a joint salvage operation and both are entitled to participate in the award. *The Flottbek*, 118 F. 954; *Atlantic Transport Co. v. U. S.*, 42 F. 2d. 583. Here libellant Puget Sound Tug & Barge Company was the owner of the *Neptune* and chartered owner of the *Hercules*. While the monetary loss of the *Neptune* is not an allowable item as such in computing the amount of the award, her loss does make certain the existence of the danger to which she was subjected and the item of recovery due to peril may be approximately measured by it. *The Alabama*, 280 F. 738.

In view of the foregoing the Court determines that an allowance to the *Neptune* interests of twenty-two and one-half per cent of the award, or \$10,125.00, would be proper.

Hercules

The *Hercules* was dispatched to the aid of the *Herald* from Seattle, arriving in the early morning of November 18th. She got her tow wire to the ship while it was at anchor and she and the *Sea Fox* towed the vessel to Everett. While she did not encounter as great danger as did the *Sea Fox* and the *Neptune*, nevertheless there were heavy seas and strong winds on the 18th and she was subjected to considerable hazard. Her efforts were voluntary and materially aided the rescue of the *Herald*. Under these circumstances the Court feels that she should share in the award to the extent of twenty-two and one-half per cent, or \$10,125.00.

There remains for disposition respondent Waterman's cross-libel against Shipowners in case No. 25,539. This proceeds on the ground that because of its alleged negligence, Shipowners is ultimately liable to Waterman for all salvage claims and for damage sustained by the Herald. The Court's finding of no negligence disposes of the cross-libel and it will be dismissed. However, even if the Court had found otherwise the cross-libel would be dismissed since the record discloses that the towage contract between Shipowners and Everett-Pacific released the tug from liability and that with knowledge of this provision Waterman procured insurance likewise releasing the tug from liability and paid therefor the higher premium rate.

In view of the foregoing it is, therefore, by the Court

Ordered that there be entered herein, upon findings of fact and conclusions of law, a decree in favor of libelants for an aggregate salvage award in the sum of \$45,000.00, said award to be divided as follows: \$20,250.00 to Puget Sound Tug & Barge Company and Cary-Davis Tug & Barge Company on their own behalf and on behalf of the masters, officers and crew of the Tugs Neptune and Hercules, of which \$2,532.00 is fixed as the proportion due the master, officers and crew of the Tug Neptune and of which \$2,532.00 is fixed as the proportion due the master, officers and crew of the Tug Hercules to be divided between them in proportion to

their wages at the time of the rendition of the salvage service; and \$24,750.00 to Shipowners & Merchants Towboat Co., Ltd., and Tug Sea Fox, Inc., on their own behalf and on behalf of the master, officers and crew of the Tug Sea Fox, of which \$6,188.00 is fixed as the proportion due the master, officers and crew of the said Tug Sea Fox to be divided between them in proportion to their wages at the time of the salvage service.

Further Ordered that the cross-libel heretofore filed in case No. 25,539 be and the same hereby is Dismissed.

Further Ordered that the libelants recover their costs.

Dated: June 5th, 1951.

/s/ MICHAEL J. ROCHE,
Chief United States District
Judge.

[Endorsed]: Filed June 5, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause, which was consolidated for trial with case No. 25,538 entitled Puget Sound Tug & Barge Company, et al., v. Waterman Steamship Corporation, came on regularly for hearing on January 17th, 18th and 22nd, 1951, before the Honorable Michael J. Roche, United States District Judge. Messrs. Joseph B. McKeon, Esq. and Henry V. Colby, Esq. appeared as proctors for libelants; Messrs. Graham & Morse by Clarence G. Morse, Esq. and Francis L. Tetreault, Esq. appeared as proctors for respondent Waterman Steamship Corporation. The cause was duly heard upon the pleadings and upon the evidence, both oral and documentary, and upon oral and written stipulations herein. The cause was thereupon submitted upon written briefs which the court has fully considered together with the said pleadings and proofs and, the court having filed an opinion herein and being now fully advised in the premises, makes the following findings of fact and conclusions of law.

Findings of Fact

The court finds that:

I.

Libelant Shipowners & Merchants Towboat Co., Ltd., is now and at all times herein mentioned has

been a corporation existing under and by virtue of the laws of the State of California and at all times herein mentioned was the bareboat or demise charterer of the diesel tug Sea Fox; it maintained, operated and navigated said tug at its own expense; that libelant Tug Sea Fox, Inc., is now and at all times herein mentioned has been a corporation existing under and by virtue of the laws of the State of California and at all times herein mentioned was the owner of the diesel tug Sea Fox.

II.

That respondent Waterman Steamship Corporation is now and at all times herein mentioned has been a corporation existing under and by virtue of the laws of the State of Alabama; that at the time of the rendition of the herein mentioned salvage services to the steamer Herald of the Morning, hereinafter called "Herald," said steamer was owned by Waterman Steamship Corporation.

III.

At all pertinent times the tug Sea Fox was an ocean going diesel tug of 282 gross registered tons and a rated horsepower of 1200, having a fair market value of \$125,000; that the Herald is a C-2 type of cargo vessel of 8663 dead weight tons, with an over-all length of 435 feet, with a beam of 63 feet and a molded depth of 40 feet 6 inches; she was without cargo or ballast and was drawing 8 feet 11 inches forward and 17 feet 3 inches aft; in such condition she sat high in the water and was a broad

target for the wind; at the time of the completion of the salvage services herein mentioned the Herald had a value of somewhere between \$1,054,000.00, the sum for which she was insured for the voyage, and \$375,000.00, which it was testified was the very minimum value that could be placed on her; that if the Herald had not been saved respondent would have been obliged to pay her purchase price of \$957,818.00; that said steamer at all times herein mentioned was a dead ship without power of propulsion or any power to handle her anchors, gear, life boats, equipment or towing hawser; that she had a single anchor available for use but that anchor was lost before the tug Hercules, with the tug Sea Fox, got under way with her in tow on November 18, 1948. She had on board a master, 3 officers and a crew of 12.

IV.

On or about November 1st, 1948, libelant Shipowners & Merchants Towboat Co., Ltd., was engaged to furnish the Tug Sea Fox and use its best efforts to tow the Herald from San Francisco Bay to Everett, Washington; on November 5th her 13¼-inch towing hawser was shackled on to the starboard anchor chain of the Herald and, with the assistance of the tug Sea Wolf, departed from Oakland with the Herald in tow; enroute the wind was blowing the Herald forward and abreast of the tug on many occasions and she was frequently sheering and falling off into the trough of the sea; wind and seas continued to increase and both vessels were pitching

heavily, all of which required the tug to throttle down speed on her engine; on November 7th the towing hawser parted and thereafter the Sea Fox succeeded in passing her spare steel hawser to the Herald; this hawser fouled on the winch drum of the towing engine and had to be severed and all but 600 feet of it was dropped overboard; this accident also damaged and made useless the fair lead traveler on the winch drum; this traveler is a device used when the steel hawser is wound in and it serves to guide the wire into place on the winch drum; Shipowners & Merchants Towboat Co., Ltd., dispatched the tug Sea Prince from San Francisco which took the Herald in tow and the three vessels put into Drakes Bay where the 13¼-inch steel hawser of the Sea Prince was secured aboard the Herald and the other end thereof passed to the Sea Fox, and on November 9th the Sea Fox with the Herald in tow resumed the voyage northward.

V.

After proceeding about two-thirds of the distance to Everett, during which the Herald was sheering badly through no fault of the tug Sea Fox, the weather and seas increased greatly and the heavy gears on the winch drum of the tug's towing engine carried away; this permitted the towing hawser to pay out so emergency measures were attempted to prevent the winch drum from turning and thereby permitting the hawser to pay out; the towing board on the tug's stern, which is designed to prevent the hawser from chafing, went overboard; with the wind

and seas increasing in intensity, the strain on her hawser and towing engine were greatly increased and the Sea Fox radioed for assistance and then headed further out for sea to ride out the storm and make the distance to shore greater thereby affording a better opportunity of rescue if the hawser parted and the Herald went adrift; a preventer wire had been placed in position in an effort to ease the strain on the towing hawser and the towing engine; the Coast Guard Cutter Balsam reached the scene about 8:00 p.m. on November 14th and the tug Neptune, on a voyage to Seattle, arrived on November 15th; the Neptune made several attempts without success to put a line aboard the Herald from the lee side; the storm increased to a whole gale with raging seas and shortly after midnight on the 15th at the height of the storm the towing hawser parted and the Herald went drifting off in the night; without motive power she lay broadside to the wind and began to drift northeasterly toward shore which was then estimated to be about 40 miles distant; being advised of the parting of the hawser of the Sea Fox, the Neptune together with the Sea Fox, put out after the drifting Herald; after day-break on the 16th the Neptune made every effort to get a line aboard the drifting Herald from the lee side but was unable to get close enough without danger of being run down; the Neptune approached the Herald's bow from the windward and after considerable maneuvering she succeeded in getting the end of a wire pendant attached to her 1¾-inch steel

hawser up to the chock of the Herald but the latter's crew, which had to pull the pendant and hawser in by hand, was unable to lift the pendant over or through the steamer's chock so that it might be secured aboard their vessel; the crew continued their efforts for about an hour, during which time the Herald was drifting toward shore rapidly, and during which time the Neptune maneuvered as close as she dared in order to lessen the weight and drag of the steel pendant and hawser; suddenly a great sea struck the Neptune when her bow was about 75 feet distant from the bow of the Herald and drove her right at the Herald's stem; at the same time the force of the same sea lifted the Herald and when she came down her stem knifed through the starboard side of the Neptune inflicting a mortal wound; she soon thereafter had to be abandoned; one of her officers fell overboard and died, apparently from a heart attack; her remaining men were removed to the Balsam by means of a life raft and the Balsam took after the drifting Herald after instructing the Sea Fox to stand by the Neptune; the Sea Fox stood by the sinking Neptune until she went down some 5 hours later, and then proceeded as fast as she could for the Herald; in the meantime the Balsam got her 10-inch manila hawser on the Herald but it soon parted in the storm and the Herald continued drifting toward shore which it was estimated she would strike about midnight; the Balsam had no other hawser suitable for use; when the Sea Fox caught up again with the Herald she instructed the Herald to drop her only anchor at

about the 30 fathom mark; the Herald failed to pay out enough chain so she dragged and the Sea Fox instructed her to let go 9 shots or all of her chain after which she apparently held; the Sea Fox tried to shoot a line to the Herald by means of a Lyle gun but her efforts failed under the prevailing adverse conditions; the Herald's position at anchor was approximately 46°, 42.5 north, 124° 19' west.

VI.

On the morning of the 17th the Coast Guard Cutter Winona arrived on the scene.

At this time the weather and sea had moderated; the damaged condition of the towing machine of the Sea Fox was explained and at the suggestion of the Sea Fox the Winona passed one end of her 12-inch manila hawser to the Herald and the other end to the Sea Fox and she moved out ahead of the Herald and kept her engine going ahead in order to ease the strain on the Herald's anchor chain and gear which was increasing as wind and sea got bad again; the Balsam left the scene to take the Neptune's survivors to Astoria after which she returned; the Winona remained until after the Hercules, which had departed from Seattle to the rescue, arrived shortly after midnight on the 18th.

VII.

After daybreak on the 18th the Hercules got her 13¼-inch towing hawser aboard the Herald where it was made fast, both the Sea Fox and the Hercules were soon in difficulty because in their effort to keep far enough apart to avoid collision they broached

broadside to the wind and were carried down abaft the Herald where they were "in irons" unable to move in any direction and they were in a helpless situation in which there was danger of collision; the crew of the Herald endeavored unsuccessfully to slip her anchor or release the anchor chain so the chain finally had to be cut with an acetylene torch borrowed from the Balsam; the Herald's only usable anchor was left on the bottom; thereafter the Herald in tow of the Hercules and the Sea Fox got under way for port; they reached Everett, Washington on the night of the 19th of November and the Hercules then returned to Seattle where she arrived about 1:00 a.m. on the 20th.

VIII.

The towing arrangement under which the Hercules and Sea Fox started out with the Herald was not the safest or best for ocean towing inasmuch as neither hawser could be made fast to the Herald's anchor chain which had been cut, and the hawser of the Sea Fox had to be secured to her towing bitts; the towing machine of the Sea Fox had been so previously damaged in her efforts to hold onto the Herald in the storm and dangerous seas that it was not usable at all; while enroute to port wind of gale proportion and heavy seas were encountered by the Hercules and Sea Fox with the Herald in tow; in all probability a 12-inch manila hawser if it only had been in use at the time would not have survived this storm; during this time the Herald was without any anchor and if she got adrift again in all probability she would have gone ashore; it is extremely

doubtful that the Herald, in the absence of any assistance from the Sea Fox or the Hercules, would have been able to weather this gale and these heavy seas if she had remained at her place of anchorage; during the period when the Herald was being held only by her anchor the weather had moderated and was relatively calm; by the time the wind and seas began to increase in force again the Sea Fox had a 12-inch manila hawser on the Herald and by keeping her engine going ahead she materially eased the strain on the Herald's anchor and gear; the Balsam did not have any suitable hawser and she was not equipped to tow the Herald into port; the Winona did not have a usable steel hawser; she was not equipped with a towing engine and the strong probabilities are that her manila hawser alone would not have been sufficient to bring the Herald into port; the equipment of the tug Hercules was essential for that purpose and the joint use of the Hercules and the Sea Fox was justified under all of the circumstances; the Balsam accompanied the Herald until tugs and the tow entered the straits of Juan De Fuca; the USS Prairie, a Navy tender, did not render any service to the Herald.

IX.

After the towing hawser parted shortly after midnight on November 16th the Herald was in grave danger and in impending peril; she was rescued therefrom only through the efforts of the Sea Fox and the Hercules, assisted by the Coast Guard Cutters Balsam and Winona; the services were suc-

cessfully performed and the master, officers and crew of the Sea Fox displayed promptitude, skill, energy and courage; she was shipping green seas at various times with danger of her men being washed overboard; there was danger of collision and ever present was the danger of a line fouling her propellor; the services were performed under hazardous conditions; the Sea Fox ultimately was successful in bringing the Herald into port with the joint help of the tug Hercules.

X.

The libelant master, officers and crew of the tug Sea Fox at the time of the rendition of the salvage services were:

Sea Fox

Rudolph T. Sommer, Master

James Reichel

Charles J. Harris

Gysbert Oliemans

Friedrich J. Ruyters

Cornielis Vanderboon

Theodore Slowiskow

Charles J. Olsen

Arthur V. Joudrey

Giocondo Ceccato

William Schmidt

Jerry M. Delmas.

XI.

Captain Sommer had been master of the tug Sea Fox for six years, operating under a master's license for San Francisco Bay and tributaries; said

license was not an unlimited one and it did not apply to him while on the high seas; Captain Sommer had considerable experience as a master of tugs in ocean towing and during the year 1948 prior to the towage of the Herald was the master of the Sea Fox while she was engaged in safely towing eight vessels on the Pacific Coast between San Francisco and the State of Washington and intermediate ports, three of which were precisely like the Herald and of the same dimensions; that at all times mentioned herein Captain Reichel, the chief officer of the Sea Fox, held a master's license which was an unlimited one and qualified him to be master of vessels of any tonnage on any ocean; Captain Reichel was an experienced tugboat man; that at all times mentioned herein C. J. Harris, who was the second mate of the Sea Fox, had an unlimited license to serve as chief officer on vessels of any tonnage on any ocean; that Captains Sommer and Reichel conferred frequently regarding the operation and navigation of the tug Sea Fox while towing the Herald and Captain Reichel made the nautical observations and took the sights in connection with the navigation of the Sea Fox; Captains Sommer and Reichel were experienced tugboat men and each of them impressed the court as able, competent, courageous and truthful mariners; that neither the Sea Fox nor her master nor Shipowners & Merchants Towboat Co., Ltd., nor Tug Sea Fox, Inc., was negligent or acted wrongfully in any of the particulars specified in the cross-libel or at all; that nothing that Captain Sommer did or failed to do

contributed in any way to the situation which gave rise to the necessity for the rendition of salvage services to the *Herald*; that the lack of an unlimited master's license on the part of Captain Sommer did not and could not have contributed to the plight of the *Herald*; the *Herald* went adrift and into a position of grave danger solely by reason of the violence of the storm; that the parting of the hawser of the *Sea Fox* in the full gale on November 16th, 1948, was an event over which neither Captain Sommer nor any other human had or could have any control; that the *Herald* went adrift in said gale without fault or negligence upon the part of anyone; the parting of the hawser was not occasioned or contributed to by the *Sea Fox* or libelants or any fault or neglect on their part; that the *Sea Fox* thereafter incurred the aforementioned risks and performed the aforesaid duties and services which were not within the scope of her original towage contract.

XII.

Prior to the commencement of the towage service, an arrangement was made between respondent and Pacific Car & Foundry Company, doing business as Everett Pacific Shipbuilding and Drydock Company, hereinafter called "Everett-Pacific" for the reconversion repairs to the *Herald* at Everett, Washington; pursuant thereto Everett-Pacific contracted with Shipowners & Merchants Towboat Co., Ltd., for the towage of the *Herald* to Everett, Washington, it being agreed that the towing tug, in consideration of an additional premium, would have the benefit of

the hull insurance on the *Herald* which was to be arranged for by respondent; as a condition precedent to the extension of said insurance to the tug or the release of the latter from liability, the hull underwriters on the *Herald* required that the towing tug and the make-up of the tow be passed upon and approved by a surveyor acting for them; Sudden & Christenson, Inc., as agent for Everett-Pacific, undertook the task of preparing the *Herald* for the towage venture and the libelants did not have anything to do with the make-up of the tow or preparing her for the venture; that the tug *Sea Fox* and the make-up of the tow were approved by the surveyor selected by the aforesaid underwriters and he pronounced them fit for the venture in November 1948 with the proviso that during the trip advantage should be taken of favorable weather to the extent possible; libelants complied with the wishes of Everett-Pacific and respondent with respect to the time for the performance of the voyage; Sudden & Christenson, Inc., also was the Pacific Coast Agent for respondent; that Sudden & Christenson, Inc., informed Everett-Pacific that respondent would arrange for the towage risk insurance and respondent thereafter did arrange for and place such insurance; that respondent paid the hull underwriters an additional premium for the extension of the insurance to the tug or for the release of the latter from liability; that by the terms of the policy of insurance issued by said hull underwriters the tug *Sea Fox* was released from any liability; that it was understood and agreed between all parties that the

risk to the Herald during the towing venture would be borne by the hull underwriters without any right of subrogation against the towing tug and that said hull underwriters would make good any loss resulting from perils insured against on the voyage of which salvage was one; that respondent and Everett-Pacific were anxious to move the Herald to Everett, Washington, as quickly as possible and during the month of November, 1948.

XIII.

Taking all of the circumstances into account, I find that libelants are entitled to an award of \$24,750 which should be divided between owners and master, officers and crew as follows: \$6,188 as the proportion due the master, officers and crew of the Sea Fox, to be divided between them in proportion to their wages at the time of the rendition of the salvage service, and the balance of \$18,562 to owners.

Conclusions of Law

And as conclusions of law the court finds that:

I.

Libelants are entitled to a salvage award of \$24,750, and judgment for said sum of \$24,750, with interest thereon at the rate of 7% per annum from the date hereof until paid, shall be entered herein in favor of Shipowners & Merchants Towboat Co., Ltd., and Tug Sea Fox, Inc., on their own behalf and on behalf of the master, officers and crew of the tug Sea Fox, of which \$6,188 is fixed as the propor-

tion due the master, officers and crew of the Sea Fox, to be divided between them in proportion to their wages at the time of the rendition of the salvage services herein.

II.

That respondent's cross-libel should be dismissed.

III.

That respondent Waterman Steamship Corporation is estopped from claiming or contending that the policy issued by the hull underwriters on the Herald did not inure to the benefit of the Sea Fox or that said policy did not release the tug Sea Fox from liability.

IV.

Libelants shall have judgment for their costs.

Dated June 20, 1951.

/s/ MICHAEL J. ROCHE,

United States District Judge.

Lodged June 8, 1951.

[Endorsed]: Filed June 20, 1951.

In the Southern Division of the United States
District Court for the Northern District of
California

In Admiralty No. 25539 E

SHIPOWNERS & MERCHANTS TOWBOAT
CO., LTD., a Corporation, on Its Own Behalf
and on Behalf of the Master, Officers and Crew
of the Tug SEA FOX,

Libelants,

vs.

WATERMAN STEAMSHIP CORPORATION, a
Corporation,

Respondent.

WATERMAN STEAMSHIP CORPORATION, a
Corporation,

Cross Libelant,

vs.

SHIPOWNERS & MERCHANTS TOWBOAT
CO., LTD., a Corporation,

Cross-Respondent.

FINAL DECREE

By reason of the law and the findings of fact on
file herein,

It Is Hereby Ordered, Adjudged and Decreed:

That libelants, Shipowners & Merchants Towboat

Co., Ltd., a corporation, and Tug Sea Fox, Inc., a corporation, on their own behalf and on behalf of the master, officers and crew of the tug Sea Fox, do have and recover from Waterman Steamship Corporation, a corporation, the sum of Twenty-Four Thousand Seven Hundred Fifty Dollars (\$24,750.00), with interest thereon at 7% per annum from the date hereof until paid, of which Six Thousand One Hundred Eighty-eight Dollars (\$6,188.00), with interest as aforesaid, is the proportion due the master, officers and crew of the tug Sea Fox, to be divided between them in proportion to their wages at the time of the rendition of the salvage services herein, together with libelants' costs in the sum of \$29.24, with interest on said costs at 7% per annum from the date hereof until paid;

It Is Further Ordered, Adjudged and Decreed that payment of the amounts hereinabove awarded to proctors for libelants shall constitute a full discharge and satisfaction of all of libelants' claims for salvage arising out of the matters alleged in the libel, as amended.

It Is Further Ordered, Adjudged and Decreed that cross-libelant take nothing by its cross-libel and that the same be and it is hereby dismissed.

Unless this decree be satisfied within ten (10) days after the entry thereof and notice to proctors for respondent, the sureties or stipulators for costs do cause the engagement of their stipulation to be performed or show cause within four (4) days after the expiration of said ten (10) days, why

execution should not issue against them, their goods, chattels and lands to enforce satisfaction of this decree.

Dated June 20th, 1951.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Lodged June 8, 1951.

[Endorsed]: Filed June 20, 1951.

Entered June 21, 1951.

[Title of District Court and Cause.]

PETITION FOR APPEAL

Waterman Steamship Corporation, a corporation, respondent and cross-libelant herein, being aggrieved by the final decree made the 20th day of June, 1951, and entered herein on the 21st day of June, 1951, claims an appeal from said final decree and prays that said appeal may be allowed and, pursuant to Rule 36 of the Rules of the United States Court of Appeals for the Ninth Circuit, that it be limited to the review of the following questions involved in the cause:

1. The propriety of making any award for salvage in favor of libelants.
2. The award in favor of libelants in the amount of \$24,750.00 with interest and costs is excessive.
3. The propriety of the decree dismissing the cross-libel.

Dated San Francisco, August 28, 1951.

GRAHAM & MORSE,

/s/ CLARENCE G. MORSE,

Proctors for Waterman
Steamship Corporation.

[Endorsed]: Filed September 17, 1951.

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

Pursuant to the petition for appeal of Waterman Steamship Corporation, a corporation, respondent and cross-libelant herein, dated August 28, 1951, presented this date to the Court,

It Is Hereby Ordered that the appeal of Waterman Steamship Corporation, respondent and cross-libelant, from the final decree made the 20th day of June, 1951, and entered herein on the 21st day of June, 1951, be allowed as prayed for, and that said Waterman Steamship Corporation, a corporation, file an appeal bond with a corporate surety in the amount of \$30,000.00, and that upon the filing of said bond all proceedings under said final decree be stayed.

Dated September 17th, 1951.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed September 17, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Shipowners & Merchants Towboat Co., Ltd., a corporation, and Tug Sea Fox, Inc., a corporation, on their own behalf and on behalf of the Master, officers and crew of the Tug Sea Fox, Libelants and Cross-Respondent, and to Joseph B. McKeon, Esq., and Messrs. McKeon & Colby, their proctors:

Please Take Notice that Waterman Steamship Corporation, a corporation, respondent and cross-libelant herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final decree made the 20th day of June, 1951, and entered the 21st day of June, 1951, by the above-entitled Court, limited to a review of the following questions involved in the cause:

1. The propriety of making any award for salvage in favor of libelants.
2. The award in favor of libelants in the amount of \$24,750.00 with interest and costs is excessive.
3. The propriety of the decree dismissing the cross-libel.

Dated August 28, 1951.

GRAHAM & MORSE,

/s/ CLARENCE G. MORSE,

Proctors for Waterman

Steamship Corporation.

[Endorsed]: Filed September 17, 1951.

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Waterman Steamship Corporation, a corporation, respondent, cross-libelant and appellant herein, hereby assigns error in the proceedings, orders and final decision of the District Court in the above-entitled cause as follows:

1. In finding and concluding that libelants are entitled to a decree, and in entering a decree in favor of libelants in amount of \$24,750.00 with interest and costs.

2. In dismissing the cross-libel.

3. In failing to enter a decree in favor of cross-libelant as prayed.

4. In finding that the Herald of the Morning had a value in excess of \$375,000.00 and in failing to deduct from the fair market value of the vessel, if in class, the cost of placing the vessel in class.

5. In failing to find that libelants were at fault in departing from Drake's Bay, in that (a) the fair lead traveler was broken and not in repair, (b) the Sea Fox had no insurance wire aboard, and (c) the Sea Fox was unable to handle the tow in the moderately severe weather theretofore experienced.

6. In failing to find that libelants disregarded broadcasts of approaching stormy weather, failed to call for aid promptly and took no precautions to protect the tow.

7. In failing to find that the Balsam instructed the Sea Fox when to instruct the tow to drop her anchor.

8. In failing to find that but for the assistance of the Balsam and the 12" hawser obtained from the Winona, the Sea Fox could have been of no real assistance to the tow subsequent to the morning of November 16.

9. In unduly minimizing the value of the services of the Coast Guard Cutters Winona and Balsam and the Navy Tender USS Prairie and in failing to find that the services of those vessels were of a value in excess of 50% of the aggregate value of all salvage services.

10. In failing to find that the Tug Sea Fox was acting in violation of the International Convention Covering the Minimum Requirement of Professional Capacity for Masters and Officers at Sea and 46 U.S.C., Section 224a.

11. In finding that the lack of an unlimited master's license on the part of Captain Somner and his failure to comply with the qualifications required by 46 U.S.C. Section 224a did not and could not have contributed to the plight of the tow.

12. In finding that libelants assumed risks and performed duties and services which were not within the scope of the original towing contract, and in failing to find that the services rendered by libelants were merely those required of them under the

towage contract and the existing conditions affecting the tug and tow.

13. In finding that by the terms of the policy of insurance on the *Herald of the Morning*, the Tug *Sea Fox* was released from any liability to this respondent.

14. In finding that the risk to the *Herald of the Morning* would be borne by the hull underwriters without any right of subrogation against the towing tug.

15. In concluding that respondent is estopped from claiming or contending that the policy issued by the hull underwriters on the *Herald* did not inure to the benefit of the *Sea Fox* or that said policy did not release the tug *Sea Fox* from liability.

16. In failing to find that the services rendered by libelants were rendered merely in conformance with their contractual obligation to use their best efforts during the towing operation.

17. In failing to find that the existing towage agreement is a bar to any recovery of salvage by libelants.

18. In failing to find that any salvage award otherwise attributable to libelants should have been reduced by reason of the existing towage agreement.

19. In failing to find that the weather encountered on the voyage was normal for that area and season and within the contemplation of libelants.

20. In failing to find that libelants sailed from San Francisco and from Drake's Bay contrary to their obligation to take advantage of favorable weather.

21. In failing to find that the weather conditions for that season and area were not of a character to frustrate the towage contract.

Dated August 28, 1951.

GRAHAM & MORSE,

/s/ CLARENCE G. MORSE,

Proctors for Waterman Steamship Corporation,
Respondent, Cross-Libelant and Appellant.

[Endorsed]: Filed September 17, 1951.

[Title of District Court and Cause.]

PRAECIPE FOR APOSTLES ON APPEAL

To the Clerk of the Above-Entitled Court:

Waterman Steamship Corporation, a corporation, respondent, cross-libelant and appellant herein, having appealed to the United States Court of Appeals for the Ninth Circuit from the Final Decree made by the above-entitled Court on the 20th day of June, 1951, and entered herein on the 21st day of June, 1951, you are hereby requested to prepare and certify Apostles on Appeal in accordance with Rule 37 of the Rules of the United States Court of Ap-

peals for the Ninth Circuit and applicable rules of this Court, and to file said Apostles on Appeal in said Appellate Court in due course. The Apostles on Appeal shall consist of the following:

- (1) Libel for Salvage.
- (2) Answer to Libel for Salvage.
- (3) Cross-Libel for Damages.
- (4) Answer of Shipowners & Merchants Towboat Co., Ltd.
- (5) Answers of Respondent and Cross-Libelant Waterman Steamship Corporation to Interrogatories Propounded by Libelants and Cross-Respondent.
- (6) Amendment to Libel.
- (7) Amendment to Answer to Libel for Salvage.
- (8) Amendment to Answer of Shipowners & Merchants Towboat Co., Ltd., to Cross-Libel and Interrogatories propounded to Cross-Libelant.
- (9) Answers to Interrogatories propounded to Cross-Libelant.
- (10) Memorandum Opinion.
- (11) Amendments Proposed by Waterman Steamship Corporation to Draft Findings of Fact and Conclusion of Law Heretofore Filed.
- (12) Findings of Fact and Conclusions of Law dated June 20, 1951.
- (13) Final Decree dated June 20, 1951.
- (14) Reporter's Transcript of the Proceedings at the Hearings had before the Honorable Michael J. Roche for January 17, 18 and 22, 1951.
- (15) Petition for Appeal.

- (16) Order Allowing Appeal.
- (17) Notice of Appeal.
- (18) Praecipe for Apostles on Appeal.
- (19) Assignment of Errors.
- (20) Petition for Order Fixing Supersedeas Bond.
- (21) Cost and Supersedeas Bond on Appeal.
- (24) Stipulation as to Service of Papers on Appeal.
- (25) All interrogatories and cross-interrogatories included in the pleadings.

Dated September 17, 1951.

GRAHAM & MORSE,

/s/ CLARENCE G. MORSE,

Proctors for Waterman Steamship Corporation,
Respondent, Cross-Libelant and Appellant.

[Endorsed]: Filed September 17, 1951.

[Title of District Court and Cause.]

PETITION FOR ORDER FIXING
SUPERSEDEAS BOND

To the Honorable the Judges of the United States
District Court for the Southern Division of
the Northern District of California:

Waterman Steamship Corporation, a corporation, respondent, cross-libelant and appellant herein, hereby requests this Honorable Court to fix a supersedeas and cost bond on appeal in the above-captioned matter in the amount of \$30,000.00.

Judgment heretofore rendered in this matter on June 20, 1951, was in favor of libelants in the amount of \$24,750.00, together with interest thereon at 7% per annum from June 20, 1951, as more fully set forth in said Final Decree dated June 20, 1951. Costs of suit in the trial court have been allowed in the sum of \$14.24. It is reasonable to assume that the appeal in this matter will be decided in not exceeding one year from date, and therefore the sum of \$30,000.00 is an adequate bond to protect the appellees.

Wherefore it is respectfully prayed that a cost and supersedeas bond be fixed in the amount of \$30,000.00.

GRAHAM & MORSE,

/s/ CLARENCE G. MORSE,

Proctors for Waterman

Steamship Corporation.

Stipulated this 17th day of September, 1951, that the Supersedeas Bond may be fixed by the Court in the amount of \$30,000.00.

/s/ JOSEPH B. McKEON,

McKEON & COLBY,

Proctors for Shipowners & Merchants Towboat Co.,
Ltd., et al., Libelants, Cross-Respondent and
Appellees.

[Endorsed]: Filed September 17, 1951.

[Title of District Court and Cause.]

COST AND SUPERSEDEAS BOND
ON APPEAL

Know All Men by These Presents:

That we, Waterman Steamship Corporation, a corporation, the above-named respondent and cross-libelant, and Fireman's Fund Indemnity Company, a corporation duly authorized and existing under and by virtue of the laws of the State of California, and duly empowered by law to act as and bind itself as a surety and to transact a surety business within the State of California, as surety, are held and firmly bound unto Shipowners & Merchants Towboat Co., Ltd., a corporation, and Tug Sea Fox, Inc., a corporation, on their own behalf and on behalf of the Master, officers and crew of the Tug Sea Fox, libelants, and unto Shipowners & Merchants Towboat Co., Ltd., a corporation, cross-respondent, in the above-entitled action, in the full and just sum of Thirty Thousand Dollars (\$30,000.00), to be paid to said Shipowners & Merchants Towboat Co., Ltd., a corporation, and Tug Sea Fox, Inc., a corporation, on their own behalf and on behalf of the Master, officers and crew of the Tug Sea Fox, libelants, and Shipowners & Merchants Towboat Co., Ltd., a corporation, cross-respondent, their and each of their successors or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents.

Signed and Dated this 17 day of September, 1951.

Whereas, lately and on the 20th day of June, 1951, at a regular term of the District Court of the United States for the Northern District of California, Southern Division, in a suit pending in said Court between Shipowners & Merchants Towboat Co., Ltd., a corporation, and Tug Sea Fox, Inc., a corporation, on their own behalf and on behalf of the Master, officers and crew of the Tug Sea Fox, libelants, and Shipowners & Merchants Towboat Co., Ltd., a corporation, cross-respondent and Waterman Steamship Corporation, a corporation, respondent and cross-libelant, and numbered on the Docket in Admiralty of said Court as No. 25,539, a final judgment and decree was rendered in favor of Shipowners & Merchant Towboat Co., Ltd., a corporation, and Tug Sea Fox, Inc., a corporation, on their own behalf and on behalf of the Master, officers and crew of the Tug Sea Fox, libelant, and Shipowners & Merchants Towboat Co., Ltd., a corporation, cross respondent, and against Waterman Steamship Corporation, a corporation, respondent and cross-libelant, and the said respondent and cross-libelant has filed in the office of the Clerk of said District Court a Notice of Appeal from said final judgment and decree to the Court of Appeals for the Ninth Circuit to be holden in the City of San Francisco and the State of California.

Now, the Condition of the Obligation Is Such that if Waterman Steamship Corporation, a corporation, shall satisfy the judgment in full, together with costs, interest and damages for delay, if for

any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the Appellate Court may adjudge and award if the judgment is modified, then the above obligation is void, else to remain in full force and effect.

This bond shall be deemed and construed to contain the "express agreement" for summary judgment and execution thereon mentioned in Rule 73 of the Rules of Civil Procedure for the District Courts of the United States and Admiralty Rule 19.

Dated San Francisco, September 17, 1951.

[Seal]

FIREMAN'S FUND

INDEMNITY COMPANY,

By /s/ F. J. BUTCHER,

Its Attorney in Fact.

WATERMAN STEAMSHIP
CORPORATION,

By SUDDEN & CHRISTENSON,
INC.,

As Agents.

By /s/ FRED J. FOSTER,

Its Secretary.

State of California,

City and County of San Francisco—ss.

On this 17th day of September, 1951, before me, Alice E. Lowrie, a Notary Public in and for said City and County, State aforesaid, residing therein,

duly commissioned and sworn, personally appeared F. J. Butcher, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Fireman's Fund Indemnity Company and acknowledged to me that he subscribed the name of Fireman's Fund Indemnity Company thereto as principal, and his own as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the said City and County of San Francisco the day and year in this certificate first above written.

[Seal] /s/ ALICE E. LOWRIE,
Notary Public.

My commission expires May 23, 1952.

State of California,
City and County of San Francisco—ss.

On this 18th day of September in the year one thousand nine hundred and fifty-one, before me, Helen E. Walsh, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Fred J. Foster, known to me to be the Secretary of the corporation described in and that executed the within instrument, and also known to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof I have hereunto set my hand and affixed my official seal in the City and County of San Francisco the day and year in this certificate first above written.

[Seal] /s/ HELEN E. WALSH,
Notary Public.

My commission expires Oct. 22, 1954.

The foregoing bond is hereby approved this 18th day of September, 1951.

/s/ OLIVER J. CARTER,
United States District Judge.

The foregoing bond is hereby approved as to form this 17th day of September, 1951.

/s/ JOSEPH B. McKEON,
McKEON & COLBY,
Proctors for Shipowners & Merchants Towboat Co.,
Inc., et al., Libelants, Cross-Respondent and
Appellees.

[Endorsed]: Filed September 18, 1951.

[Title of District Court and Cause.]

STIPULATION AS TO SERVICE OF
PAPERS ON APPEAL

Receipt of service of copies of the following is
hereby acknowledged:

Notice of Appeal.

Praecipe for Apostles on Appeal.

Petition for Appeal.

Order Allowing Appeal.

Citation on Appeal.

Assignment of Errors.

Petition for Order Fixing Supersedeas Bond.

Cost and Supersedeas Bond on Appeal.

/s/ JOSEPH B. McKEON,

McKEON & COLBY,

Proctors for Libelants and
Cross-Respondent.

September 17th, 1951.

[Endorsed]: Filed September 17, 1951.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

January 17, 1951, 10:00 A.M.

Appearances:

For the Libelants:

JOSEPH B. McKEON, ESQ., and
HENRY V. COLBY, ESQ.

For the Respondents:

CLARENCE G. MORSE, ESQ., and
FRANCIS TETREAULT, ESQ.

The Clerk: Puget Sound Tug & Barge Company
v. Waterman Steamship Corporation, for trial; and
Shipowners & Merchants Towboat Co. v. Waterman
Steamship Corporation, for trial.

Mr. McKeon: Ready for libelants.

The Court: What case have you, counsel?

The Clerk: Two cases for trial, your Honor.

The Court: You may proceed.

The Clerk: Will counsel state their respective
appearances for the record?

Mr. McKeon: Joseph B. McKeon and Henry V.
Colby, for the libelants in each of the two cases.

Mr. Morse: Clarence G. Morse and Francis Tet-
reault for Waterman Steamship Corporation.

If the Court please, I have here the original an-
swers to interrogatories, which were served on
counsel yesterday, and wish to file them. In addi-

tion, I have prepared a trial memorandum, a copy for counsel, and the original for the Court.

Mr. McKeon: Shall I make an opening statement, your Honor?

The Court: You may.

Mr. McKeon: There are two libels here before the Court, the Puget Sound Tug & Barge Company against Waterman Steamship Corporation, and Shipowners & Merchants Towboat Co. against Waterman Steamship Corporation. Both of these cases are ones of salvage. Mr. Morse and I have agreed that it will be in order for the Court to make an order consolidating both cases [2*] for the purposes of trial.

Mr. Morse: So agreed.

The Court: Let the record so show.

Mr. McKeon: We are also going to try to do as much stipulating as we can, your Honor.

The Court: That will be helpful.

Mr. Morse: Like to streamline the case and we will do our utmost to assist.

Mr. McKeon: I don't think we have too much disagreement on the facts.

The tug Sea Fox under bareboat charter to the libelants and Shipowners & Merchants Towboat Company, undertook to tow a vessel known as the Herald of the Morning from Oakland Estuary to Everett, Washington. Waterman Steamship Corporation had purchased that vessel from the Government and she had to be reconditioned and re-

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

paired and the Everett Shipyard was awarded the job and pursuant to an agreement between the Everett Shipyard and the towboat company the vessel was under way and being towed to Everett.

She ran into some very bad weather and her towing hawser parted in the teeth of a full gale. She thereafter, it is our contention, rendered salvage services to the *Herald of the Morning*. The *Herald of the Morning* was a light ship. She was without cargo, without ballast, without power, without any means of propulsion, and in fact without any means of handling [3] any of her equipment aboard the ship such as anchors, without auxiliary power. She had only one anchor usable. That is the—that was the port anchor. The starboard anchor had been removed, the hawsepipe, and passed on—secured on deck. The starboard anchor chain was the medium to which the tug's towing wire was made fast. In other words, they shackled the tug's towing wire onto the anchor chain, the anchor having been removed.

Mr. Morse: May I interrupt, Mr. McKeon? It might interest the Court to inquire why, wonder why they used the anchor chain in the connection between the tug and the tow. As I understand it, the weight of the anchor chain serves as a spring when the vessels draw apart, to minimize the shock with the length of the chain, length of the line.

Mr. McKeon: Well, it is well understood that that is the best method of connecting a tow wire. There can't be any question about that.

Mr. Morse: That's right.

Mr. McKeon: During the storm the clutch on the towing machine of the tug carried away. Your Honor will remember the teeth that fit in and around the drum, they just pulled apart. They had to try to wedge that drum. It is a very huge towing machine in the aft end of the tug.

The Court: Is that on the barrel head?

Mr. McKeon: Yes, your Honor, it is a drum—I have a [4] photograph, your Honor, just intended to be illustrative, your Honor.

This tug is equipped with a one and $\frac{3}{4}$ inch steel towing hawser and that winds around the drum, but the drum is secured by brakes, automatic brakes, and hand brakes, and a brake band, and when secured for towing, everything is tight.

Well, the clutch broke, the teeth in the clutch broke. They rigged it up with a wedge and that held for a time, and that carried away. They eventually put a big chunk of iron and wedged that against the framework of the towing machine and the drum and that held it fairly securely.

They communicated for help. The tug Neptune was on her way north. The tug Neptune, which is owned by the Puget Sound Tug & Barge Company, went to the rescue, and without elaborating too much on that, your Honor, in the attempt to rescue the Herald of the Morning, she was sunk and lost.

The testimony will show that in the seas that were raging, the tug and the steamer came together at the stem while the tug actually, that is, the Nep-

tune, actually had a line up to the Herald of the Morning. On the Herald they had, I think, 13 men on the Herald.

Mr. Morse: 16 in all.

Mr. McKeon: Whatever the number. They were actually trying to haul that steel hawser in from the Neptune at the time that the two vessels came together. Then the tow, the Herald [5] of the Morning, was adrift, and the vessels put out after her and she eventually was anchored. At this time, of course, they let out her port anchor. The Puget Sound Tug & Barge Company, the owners of the Neptune, then sent down from Seattle to the scene the tug Hercules. The tug Hercules and the tug Sea Fox eventually brought the Herald of the Morning into Everett.

During this time, too, the tug Sea Fox called for assistance from the Coast Guard and the Coast Guard cutter Balsam came out and stood by, attempted to get a line aboard without success, and eventually remained in the vicinity throughout—until, I think, the 19th, 18th or 19th of November, 1948, the towing hawser of the Sea Fox having parted in the early morning of November 16.

The Coast Guard cutter Winona also appeared on the scene and succeeded in getting a manila hawser passed to the Herald of the Morning while the Herald of the Morning was at anchor and cast the other end of that line to the Sea Fox, and the Sea Fox stood by for the rest of the time, holding on to the Herald of the Morning with this twelve-

inch manila hawser, thereby adding additional protection to the *Herald* from dragging her anchor in a bad blow, drifting, and she remained there until the *Hercules* came down and made her steel wire fast to the *Herald*, and then the *Herald*—then the *Hercules* and the *Sea Fox* got under way on the 18th and brought the vessel in to Everett.

The United States Maritime Commission owned the vessel and [6] sold it to the Waterman people. In the arrangement for the tow and in connection with the price for the towing service, it was agreed that the tug, the *Sea Fox*, or the Shipowners & Merchants Towboat Co., the party to the towage contract, would have the benefit of the insurance on the *Herald of the Morning*, the Waterman people having insured that tow. It was arranged that in consideration of an additional premium, which Waterman was to pay and paid, the tug would have the benefit of the insurance and the effect was in effect the waiver of subrogation against the tug.

In other words, the loss here—put it this way: the policy of insurance on the *Herald of the Morning* insured against marine risks, including salvage. They insisted upon and made a requirement that the tug and the tow and the equipment be passed on by a surveyor to the Board of Marine Underwriters of San Francisco, the United States Salvage Association, before they would insure the risk. That was done and a surveyor to the United States Salvage Association and the San Francisco Board of Marine Underwriters did pass upon the venture

and he did approve and pass the tug, the equipment and the tow as suitable for the voyage. Despite that situation, and despite the fact that the tug has the benefit of that insurance, those same underwriters, through Waterman, this being a suit defended by underwriters through Waterman, have filed a cross-libel in the name of Waterman against the Ship-owners, claiming that the tug [7] Sea Fox was negligent in handling it.

I think that about tells the story briefly, your Honor.

Mr. Morse: Only one or two points I want to mention. Mr. McKeon, I think, overlooked mentioning where the so-called salvage services were rendered, just north of the Columbia River. In other words, the tug and tow had gotten that far north on its voyage between here and Everett, Washington.

The Court: Approximately what would be the distance?

Mr. Morse: From where?

The Court: From the Columbia River.

Mr. Morse: It was offshore about 15 or 20 miles from the Columbia River to Everett, would be in the neighborhood of 350 miles.

Mr. McKeon: Approximately two-thirds of the entire voyage.

Mr. Morse: It is our position that—I will just summarize, your Honor, the highlights of our position. One is that the tug Sea Fox is not entitled to any salvage award in this matter because it had contracted to use its best efforts to tow the Herald

of the Morning to Everett, Washington, and in performing such services as it did perform after the tug towline broke, those were performed merely in conformance with this obligation to its own tow. In other words, it couldn't, when the towline broke, it couldn't stand by and say, "O.K., Brother, you are on your own; you go your way and I'll go my way." It was obligated to do what it did do, in so far as the tug Hercules is [8] concerned. Bear in mind the fact that the tug Hercules came to the Herald of the Morning from Seattle after the Herald was at anchor and at that time had put its line—the weather had moderated very substantially—put the line from the Hercules to the Herald of the Morning and assisted the Sea Fox to proceed to and into Everett, Washington. If it is entitled to salvage, it is salvage of a low order. Substantially all it did was towage service and in those instances double towage is not an unusual award, double the average, the usual towage rate.

We contend that the main and effective assistance that was rendered to the Herald of the Morning was rendered by the Coast Guard vessels, the Balsam and Winona, which were big Coast Guard vessels equipped with salvage gear, and so forth, that stood by when the storm was at its worst, gave a line to the Sea Fox when she was at anchor, ultimately transferring that line to the—I beg your pardon—gave the line to the Herald of the Morning when the Herald of the Morning was at anchor, transferred that line to the Sea Fox. By the way, the Sea Fox apparently didn't have what we call

an insurance wire aboard. In other words, a second towing wire aboard in the event that its original wire broke, so that when its wire broke on the 14th, on the 16th of November—this is 1948, by the way—they had no means of effectively aiding the *Herald of the Morning*.

Mr. McKeon: May I correct you? I think it is important, [9] you are mistaken. They still had a wire aboard.

Mr. Morse: Well, I am glad to be corrected. To the best of our information, it wasn't passed to the *Herald of the Morning*, in any event.

Another point which we wish to bring out and develop is that the storm which occurred on this occasion was rather a severe storm, but it wasn't an unseasonable storm. It was the middle of November off the northern Oregon-Washington coast, and a storm which might normally be anticipated at any time during that month. Furthermore, storm warnings were broadcast before the tug and tow separated.

Mr. McKeon: Before what? The tug and tow what?

Mr. Morse: Separated. Which placed additional obligations on the tug to protect the interests of the tow, *Herald of the Morning*. We will endeavor to develop these more as we proceed.

Mr. McKeon: Before we start with the——

Mr. Morse: I beg your pardon. One more. We don't agree with Mr. McKeon's interpretation of the right of the *Sea Fox* to claim the benefit of the

insurance which the Waterman Steamship had, insuring the *Herald of the Morning*. Under our contract with the Maritime Commission, they were obligated to name Everett Pacific——

The Court: What is that?

Mr. Morse: Everett Pacific, the repair yard at Everett, Washington, who was doing the conversion work. This ship was [10] one of those so-called baby flat tops which was to be converted at Everett, Washington to a cargo vessel. Under our contract with the government, we were obligated to give Everett Pacific, or named Everett Pacific as an assured in that insurance policy and those arrangements were——completed the duties which Everett Pacific had with the Shipowners, the tugboat company, the owners of the tug *Sea Fox*.

Now, in that separate contract, the towage contract, Everett Pacific was obligated to insure the tug *Sea Fox* or give the tug *Sea Fox* the benefit of Everett Pacific's insurance. Everett Pacific never requested Waterman to do that, to have Everett, to have Shipowners named as an insured, and accordingly the insurance was never endorsed to name Shipowners, the *Sea Fox* owners, as an assured or waiving subrogation as to Shipowners.

Mr. McKeon: The fact is that there was an additional premium paid in consideration for the release of the tug from liability by the Underwriters.

Mr. Morse: The tug—the insurance speaks for itself, I think that is the best——

Mr. McKeon: We shall put the policy in evidence.

Mr. Morse: Yes, it will be put in evidence.

Mr. McKeon: It will be entirely new law if that tug is not entitled to benefit of the policy.

In the answers to the libels, if the Court please, there [11] were some denials which have now become admissions. The corporate status of the libelants as alleged is admitted, and with respect to the—you correct me, Mr. Morse, if I am wrong——

Mr. Morse: Certainly.

Mr. McKeon: With regard to the tug Sea Fox, it is now admitted that she was operated by the libelant Shipowners and Merchants Towboat Co., Ltd., under a bareboat or demise charter from her owner to the Shipowners.

Mr. Morse: Who was the owner?

Mr. McKeon: Tug Sea Fox Company. I have the certificates here. I shall introduce the certificates. And with regard to the tug Hercules, she was under a bareboat charter from Cary-Davis Tug & Barge Company, also a libel in the Puget Sound case, to Puget Sound Tug & Barge Company. In other words, the bareboat charters are admitted in those two cases. The tug Neptune was owned by the Puget Sound Tug & Barge Company, and in that connection I will introduce the certificate of title to each of the three tugs I think they can probably take one exhibit number for the three tugs.

The Court: They may be admitted and marked.

The Clerk: Libelant's Exhibit 1 admitted and filed in evidence.

(Whereupon the three certificates of title were received in evidence and marked Libelant's Exhibit No. 1.)

Mr. McKeon: Then I would like to introduce in evidence and [12] have deemed read without actually taking the time to read them, the interrogatories 5, 6 and 7 attached to the Shipowners' answer to the cross-libel and interrogatories 5, 6 and 7 attached to the Shipowners' answers to Waterman's third party petition in the Puget Sound case, and the answers of Waterman Steamship Corporation to each of those interrogatories. They are now attached to the pleadings as a matter of record.

The Court: Made a part of the record?

Mr. McKeon: It is my understanding, your Honor, that what I am doing is necessary on interrogatories.

The Court: Any objection to making them a part of the record?

Mr. Morse: None at all.

Mr. McKeon: What I am doing is getting them in evidence.

Mr. Morse: Why not have the interrogatories, all interrogatories and all answers part of the record?

Mr. McKeon: That is something that you can do. I don't want to get into a discussion of law and it would take a long time, your Honor. One

can't, by self-serving declarations, get them in evidence. But that is the main——

Now, there is also, as your Honor has noticed, and just served and filed this morning, some additional interrogatories and answers attached to the Shipowners' amendment to the answer to the libel, and in that connection, I would ask they be deemed read, the latter interrogatories 1, 2, 4, 5 and 6, and [13] Waterman's answers to each of those interrogatories so attached to the Shipowners' amendment to the answer to the cross-libel.

For the purposes of this case, of these cases now on trial, it is stipulated that the value of the Hercules, tug Hercules, and tug Sea Fox may be taken at \$125,000 and the tug Neptune at \$150,000. You will have the insurance contract?

Mr. Morse: Yes, sir. While we are at this position, may I interrupt to suggest we name the values of the ship we hope to prove, of the Herald of the Morning and the two Coast Guard vessels, only so that the values appear in a common place in the record without—pardon the interruption.

Mr. McKeon: Yes.

Mr. Morse: Mr. McKeon, would you be willing to stipulate if Captain Pillsbury—and Captain Pillsbury is a recognized valuation expert here on this Coast—would it be stipulated that if Captain Pillsbury were here and called to testify he would testify that the value of the Herald of the Morning upon arrival in Everett, Washington, was \$343,156.00?

Mr. McKeon: Is that the figure that you have on your tabulation?

Mr. Morse: Yes, sir.

Mr. McKeon: If you will state that is what Captain Pillsbury will testify, of course, I will accept it.

The Court: Subject to any correction.

Mr. Morse: Subject to correction. [14]

Mr. McKeon: What I am stipulating to is that if Captain Pillsbury were called, that would be what his testimony would be.

The Court: Yes.

Mr. Morse: Well, let us pass it for a moment. I am pretty sure I spoke to Captain Pillsbury on that, but I will verify it later. I did speak to Captain Pillsbury in respect to the Coast Guard vessels which just left yesterday afternoon and he stated to me that the fair depreciated replacement value, and these are specialized government type vessels, on the Balsam would be \$400,000 and of the Winona, \$750,000. Now, he stated that is a fair market value, except it is difficult to fix a fair market value on those specialized types of vessels, isn't a market for them, but that is the fair depreciated replacement value for them.

Mr. McKeon: I will make the same stipulation. If called, he would testify that that is the depreciated value.

Mr. Morse: Thank you.

Mr. McKeon: Captain Reichel.

Have we made the case sufficiently clear to your Honor to proceed with the testimony?

The Court: If not, I will ask you to clear it up after we get a record. [15]

JAMES RALPH REICHEL

called as a witness on behalf of the libelants; sworn.

The Clerk: Will you state your full name to the Court, please?

A. James Ralph Reichel, occupation master mariner.

Direct Examination

By Mr. McKeon:

Q. Captain, how long have you held a license from the United States Government?

A. Ten years.

Q. How long have you held a master's papers?

A. Five years.

Q. What are they, unlimited?

A. Unlimited, master of oceans.

Q. Prior to the Herald of the Morning episode, how long had you been engaged in the towboat business? A. About two and a half years.

Q. Have you, as master or mate of ocean-going tugs, have you had experience in ocean-going towing? A. Yes, I have.

Q. Were you the mate of the Sea Fox in November, 1948, on the voyage in which you were towing the Herald of the Morning from San Francisco Bay to Everett? A. Yes, I was.

Q. Please tell the Court the manner in which your hawser was made fast or connected to the Herald of the Morning when you [16] started out?

(Testimony of James Ralph Reichel.)

A. In leaving the dock, the hawser was made fast to the bitter end of the anchor chain of the *Herald of the Morning*.

Q. Which, the starboard or port chain?

A. That was the starboard chain.

Q. What were you using on the *Sea Fox*, a steel hawser?

A. We were made fast to the *Herald of the Morning* with a 1 $\frac{3}{4}$ inch steel hawser.

Q. Where, on the tug, was that steel hawser made fast?

A. Well, the steel hawser was made fast and was on the winch drum, which is on the after end of the towboat.

Q. And fastened onto the anchor chain, is it?

A. Yes, sir.

Q. Is the securing of it to an anchor chain the best method of towing the vessel at sea?

A. Yes, sir.

Q. In your opinion, is such a steel hawser preferable to the use of a twelve inch manila hawser for ocean towage for vessels such as the *Herald of the Morning*?

A. Yes, sir, it is.

The Court: I am afraid the Reporter is having difficulty in following you.

Q. (By Mr. McKeon): The question I asked: In your opinion, is such a steel hawser preferable to the use of a twelve inch manila hawser for ocean towage on such a vessel as the *Herald* [17]

(Testimony of James Ralph Reichel.)

of the Morning? A. I think I answered yes.

Q. Will you please tell the Court what precautions, if any, you took to protect your steel hawser on the tug?

A. Well, upon clearing, go outside, pay out the—most of the wire—

Q. I am talking about what you do with your steel hawser to protect it, let us say, from chafing or rubbing.

A. That is what I am getting at, yes, pardon me—going at it roundabout. After paying out the wire, you put on what we call a towing board which protects the hawser from chafing on the stern of the towboat.

Q. And what is that towboat made of?

A. The parts of the board consists of a very hard piece of lumber, approximately six feet long, by two and a half feet wide.

Q. Is that a fair description of what you would call your tow board?

A. Yes, that is the type we use.

The Court: Indicate it. Where is it?

The Witness: The tow board is this board right here (indicating on photograph).

Q. (By Mr. McKeon): Shackled onto the wire?

A. Fastened onto the wire.

Mr. McKeon: The effect of that, your Honor, is to keep [18] the wire away from the—

Q. When you started out, how many steel hawsers did you have on the Sea Fox?

(Testimony of James Ralph Reichel.)

A. We had two full length ones and then one about 600 feet long.

Q. Two full length ones, and one about 600?

A. I will clarify that to say the one was on the winch drum, one of the full length ones was on the drum.

Q. Do you know what that length is?

A. I would estimate about 1,200 feet.

Q. The two longer hawsers are of the same dimensions, $1\frac{3}{4}$ inches?

A. Yes, they both are the same.

Q. Will you please state the condition of the tug and towing machine and her equipment when you started out on the voyage with the Herald of the Morning?

A. Well, the entire tug, all our equipment was in first class condition.

Q. Did you have anything to do with the preparation of the Herald of the Morning for the venture?

A. No, I did not.

Q. Did any of your people, any on your tug?

A. Not that I know of.

Q. Do you know what was done with the star-board anchor on the Herald? [19]

A. No, I did not see it myself. I just know it wasn't made fast to the end of the chain.

Q. When you started out, she had the single port anchor available for use?

A. Yes, the port anchor was in the hawse pipe.

Q. That was the only one she had available for use?

A. That's right.

(Testimony of James Ralph Reichel.)

Q. Coming out from the Oakland Estuary and across the San Francisco Bay and until you got out through the gate, I understand that you had another tug assisting you?

A. Yes, the tug Sea Wolf also had a wire on her.

Q. Now, after you got outside—when I say “outside” I mean on the ocean out of San Francisco, did you have or find it necessary to throttle down or shut down on your power?

A. Not on the start of the voyage.

Q. At any time thereafter?

A. Oh, yes, later on after the weather increased, we had to slow down.

Q. Along about the 7th, the towing hawser that you had, parted? A. That is correct.

Q. And if the Court please, if I might try to state and save some time, you eventually put in at Drake’s Bay and another tug came out, the Sea Prince, and passed a line and you both went to Drake’s Bay and were ready to proceed on the voyage again, and I think the Sea Prince’s hawser was passed to you and you [20] went on with the Sea Prince’s hawser, that is, when you, when the Sea Prince’s hawser, when the steel hawser was passed to you, that was made fast around your drum?

A. Yes, that is true, but we had lost, of course, the hawser which parted.

Q. I understand that.

A. And then placed another hawser up on the

(Testimony of James Ralph Reichel.)

ship and that hawser, which tangled in the winch drum, and we had to cut it clear.

Q. Yes.

A. So then we got the hawser from the Sea Prince.

Q. Yes.

A. He made it fast to the chain of the ship and he passed the bitter end to us, which we made fast to the winch drum. We then proceeded with that hawser.

Q. Then you at that time, you had two, your own hawser, steel hawser around the drum, and another spare?

A. That is correct.

Q. And you went on your way?

A. That is correct.

Mr. Morse: May I interrupt? It isn't clear in my mind, the other spare that you had, that was the 600 foot wire?

The Witness: That is correct.

Mr. McKeon: Had three.

The Witness: No, we lost two, I am sorry. [21]

The Court: Tell us in your own way.

The Witness: Why, we had lost this one wire when it parted and the people aboard ship had let go the chain, of course they lost that part of the chain and that hawser and we placed another hawser up at that time on the ship, and then we lost that hawser, too, and so that left us with the hawser from the Sea Prince plus our short hawser.

Q. You didn't lose the second hawser? It just fouled on the drum?

(Testimony of James Ralph Reichel.)

A. But it wasn't of any use. We had to cut it, to get that off the drum completely.

Q. Then what did you do with that?

A. We dropped it overboard.

Q. You lost it overboard? A. Yes.

Q. Now, after you got on your way again with the Herald——

Mr. Morse: May I interrupt there, Mr. McKeon? As I understand the pleadings, no claim is made for salvage on this first breakdown just off——

Mr. McKeon: That is correct. We are not making any claim for compensation for this additional service.

Q. After you got under way again, did you proceed along with your tow?

A. Yes, we proceeded right up the coast making quite good time. [22]

Q. And when did you encounter weather and seas thereafter which seriously interfered with your towage?

A. I don't recall the exact date now. I could check the log book and find that in the log, but it was about the time of Point Arena, which is further north up the coast, I should say two or three days, but I am certain a few—let me see the log. I could check it when we hit the weather.

(Witness looking at log.)

On November 11, Thursday, was the time we run into more heavy weather.

(Testimony of James Ralph Reichel.)

Q. Well, then, go along and what did you encounter on the 14th?

A. Oh, the 14th was the day that it began blowing very hard and we lost our towing board over the side.

The Court: Lost your what?

The Witness: The towboard went overboard.

The Court: Towing board.

The Witness: And we were encountering tremendous seas and a very heavy blow and had to throttle down to just bare steerage way to try and preserve the wire which was stretched between us and the tow.

Q. Well, did that weather continue on through most of the 14th and 15th?

A. Yes, that weather continued on the 14th, 15th, 16th, for about three days it was heavy weather. Of course at times it blew harder and times it would ease down, but the overall picture was heavy weather. [23]

Q. Did you or your master, or did you have anything to do with communicating with the Neptune or the Coast Guard in and about that time?

A. Yes, Captain Sommer and I discussed the situation and decided to contact the Neptune, which we knew was up the coast, to have them come and stand by in case of any eventualities, and we also contacted the Coast Guard station in Astoria for the same reason.

Q. Well, now, during this weather, what, if any-

(Testimony of James Ralph Reichel.)

thing, happened to your towing machine, towing engine?

A. Well, the teeth on the clutch were torn loose, they tore right out and of course the drum started to pay out.

The Court: Indicate what it is, will you? That is here (indicating)?

The Witness: Yes, the part, that type, the underneath, the part where it was carried away, this would be the same teeth (indicating).

Mr. McKeon: I think I have a better picture of that.

The Court: All right.

Mr. McKeon: Showing the—That is the picture of the clutch?

The Witness: Yes, this is, would be the one here.

The Court: I understand.

Q. (By Mr. McKeon): What did you do after your clutch carried away? [24]

A. The clutch carried away, of course—when the clutch carried away, we, of course, tightened up as hard as we could on the hand brake and still the drum slipped, would turn the wire, turn the drum against the hand brake, so we put a steel wedge in between the side of the winch drum and the bottom of the winch itself.

The Court: Would you indicate that?

The Witness: The other picture, sir.

The Court: This one (indicating)?

The Witness: Would do better, I think. Is there

(Testimony of James Ralph Reichel.)

a third picture available showing the other side of the winch?

Mr. McKeon: I don't know. I will see.

Mr. Morse: So we will have a clear record, I suggest these be identified.

The Witness: Yes, this will show. Well, put a piece of metal in between these lugs on here on this bottom of the winch across here (indicating), which is solid iron, so that it would fetch up between here and here (indicating).

Q. (By Mr. McKeon): Explain that to the Court.

A. Yes, sir. This part was turning.

The Court: Yes.

The Witness: Inserted a piece of metal so it will be jammed up between this lug here and this solid steel part of the winch, that is the bottom of the winch, that part is made fast, of course, and that would stop the thing from turning. [25]

The Court: Referring to these photographs, I think it will be well to identify them for the purpose of the record so there won't be any question about it.

Q. (By Mr. McKeon): The one showing the clutch which carried away, which you have identified?

A. Yes.

Mr. McKeon: Shall be marked, let us say A?

The Court: Very well.

Mr. McKeon: And do you want to put the number on it?

(Testimony of James Ralph Reichel.)

The Clerk: Yes. Have to go 1, 2, 3, 4. I understand those interrogatories you were offering and the answers thereto were an exhibit also?

Mr. McKeon: No exhibits, not exhibits, just go in evidence.

The Clerk: All right. This one will be libelant's exhibit 2.

Q. (By Mr. McKeon): Is that the one——

A. No, sir, it was this. There was another one. That is the one I just showed you.

Q. What does that show, so we will have it in the record?

A. Well, that shows the starboard side of the winch.

Q. And the place where you——

A. Well, the place where the iron bar, the wedge was inserted to keep it from turning.

Mr. McKeon: That photograph, then, is that No. 3? [26]

The Court: Libelant's Exhibit 3.

Q. (By Mr. McKeon): Would you characterize the weather that you were experiencing on the 14th and 15th in layman's, not seaman's language—the Court doesn't know so much about that as you do. Neither do I. And I want you to tell the Court just exactly what that weather was.

The Court: You would be surprised how little I know about the sea.

The Witness: Well, we have a log record. We put down very rough seas, and winds as force 8,

(Testimony of James Ralph Reichel.)

9 or 10, and those are forces which are forces of intensity, zero being calm and as you get higher on the scale it gets to blowing very hard. Force 10, I would say, would be approximately 65 to 75 miles an hour.

Q. I don't want, that is not what I am after. Those are scientific words. I want you to describe to the Court——

The Court: Pardon me. He was helping me.

Mr. McKeon: I beg your pardon.

The Court: Go right on. You may develop what you had in mind. What about this 75 miles an hour?

The Witness: The force—the wind would be blowing at approximately 75 miles an hour.

The Court: Yes.

The Witness: Of course, as you know, aboard a towboat or a merchant ship, it is usually done by estimation.

The Court: Yes. [27]

The Witness: We have to use our own judgment how hard it is blowing, where naval ships have instruments to show that, but at this time the wind was blowing very hard and I estimated it was blowing 60 to 70 miles an hour, and the seas were very large in size; they would crash aboard the towboat and go up over it—saw green water. It is hard to estimate how high they would be, but I would estimate it 40 feet, because looking out from the deck of the boat they were higher than we were.

(Testimony of James Ralph Reichel.)

Q. What effect would those seas and weather have on you and the tow?

A. Well, of course the seas and weather were pounding both of us terrifically, and the ship being a light ship, and the whole side of it, just like a sail, she tended to lay over in the wind as a sailing ship would lay up in the wind. This would do the same thing, broadside into the wind, and the strain between the seas, like we go up one swell and the ship would be on another one and you would get a tremendous strain on your wire; in fact, would lift the wire and chain entirely out of the water.

The Court: Referring to your cable as a wire?

The Witness: Yes, sir, I should——

The Court: Give the dimensions.

The Witness: ——should use cable, but we speak of it as a wire.

The Court: That is why I wanted the [28] dimensions.

The Witness: $1\frac{3}{4}$.

The Court: All right.

Q. (By Mr. McKeon): And you just mentioned the whole thing rises, including the chain?

A. Yes, it would lift the wire and chain completely out of the water between the seas.

Q. You are talking about the ship's anchor chain? A. The ship's anchor chain.

Q. To which the cable or wire was made fast?

A. That is right.

Q. The Balsam, the Coast Guard cutter Balsam,

(Testimony of James Ralph Reichel.)

came out in response to your call during the part of this weather that you are describing?

A. That is right.

Q. And did the Neptune also arrive there on the scene?

A. Yes, the Balsam arrived first and the Neptune arrived next.

Q. After the arrival of the Neptune, or when both of those vessels arrived, you had your hawser fast to the Herald?

A. Yes, we were still fast.

Q. You were holding on?

A. That is right.

The Court: We will take a recess for a few minutes.

(Short recess.)

The Court: I won't have any afternoon session. I am going to a funeral. If you have any witnesses you want to excuse, [29] you may do so.

Mr. McKeon: I think in those circumstances that all might be excused until tomorrow at 10:00, your Honor?

The Court: Very well.

Mr. McKeon: The Court says there will not be any session this afternoon. We will take all morning for Captain Reichel. So if you gentlemen wish to go, you may.

If the Court please, one of these photographs, the one that showed the towing board for purposes of illustration, has not been marked for identification, and I think perhaps we better do that.

(Testimony of James Ralph Reichel.)

The Court: Very well.

Mr. McKeon: I should also state, and I think it will be conceded that it is merely for purposes of illustration, that is not where a towing board would be rigged up on the tug when in use, that is correct, isn't it?

The Witness: That is right.

Mr. McKeon: It is merely there as a photograph to show what a towing board is.

The Court: Very well.

Mr. McKeon: Not where the towing board would be located when in use.

The Clerk: Libellant's Exhibit 4 marked for identification.

Mr. McKeon: This is for identification?

The Clerk: Yes, for identification. [30]

Q. (By Mr. McKeon): You might explain to the Court where that towing board is located when in use.

A. Yes. If you assume this wire is made fast to a ship on the other end to the anchor chain, then we put it on in this position and slack out on the wire until this board just over the stern, so that every time the wire took a slide to the left or right or up or down, this part would strike the stern of the ship instead of the wire (indicating).

Q. And while we are discussing that picture, Exhibit 4 for identification, that wire that is on the board seems to come out through a pair of rollers.

A. Yes.

(Testimony of James Ralph Reichel.)

Q. What are they?

A. They are fair leads.

Q. What you call fair leads and the wire comes from the drum through those fair leads and goes aft?

A. That is right, yes.

Q. And then it is connected with——

A. It is shackled with a large shackle made fast to the anchor chain.

Q. Of the other vessel?

A. Onto a shackle about so long.

Q. Now, do you, as a matter of practice, when your wire comes out from your fair leads, make the wire fast any place on the after deck of the tug? [31]

A. No.

Q. It runs directly astern, then over the stern of the vessel, you got a roller on the stern of the vessel?

A. Yes.

Q. Metal rollers?

A. That is when the wire is either paid in or out. It turns back there to minimize friction.

Q. And that is the position where the towing board——

A. The towing board would be over the top of the roller.

Q. The idea of the towing board is to prevent chafing and rubbing of the wire?

A. That is correct.

Q. Now, did you have any other mishap with your towing machine in that weather?

A. Yes, as the storm progressed and it got worse, the strain got so bad on the drum that it forced

(Testimony of James Ralph Reichel.)

against those lugs and we had jammed and broken the piece of metal we had in there; we had a moderate sized piece of metal in there, so we had aboard a piece of metal about a foot long, maybe two feet long by six inches square, and we jammed that in there and that finally locked it. Of course, prior, between the two times these two were in, the wire was paying out and it was a case of getting it in there real quick so that the end, the end wouldn't—wouldn't come to the end of the wire and come off and lose it.

Q. What is a preventer wire? [32]

A. A preventer wire is used aboard a towboat, is a wire which would be clamped to your tow wire to help hold it. In other words, to relieve the strain off of the drum so it wouldn't have all the weight on the drum. What you do is—if I could have the picture, I think I could show you better.

Q. Which one?

A. Any one showing the after end of the winch.

The Court: Better be marked for the record.

The Witness: I think this one will do very well.

Mr. Morse: No. 4 for identification.

The Witness: You have a piece of wire, usually it is of the same size as the tow wire, but of course much shorter piece, it is a piece about ten or twelve feet long. What you do is have the wire at one end, make that eye fast in the pelican hook on the deck and the other end you make fast to the wire with clamps like these (indicating); use about four

(Testimony of James Ralph Reichel.)

of these clamps in a row and then you slack out the wire just enough so that part of the strain is on this preventer wire and part of the strain is on the drum of the winch. Is that all right?

Mr. McKeon: Intelligent to me.

The Witness: It is just to ease the strain on the drum of the winch.

Q. It is an added precaution?

A. That is correct, sir. [33]

Q. Did you have one of them on——

A. Yes, we did.

Q. On the night of the 15th, how would you characterize the weather you had?

A. Yes, the night of the 15th it was blowing very, very hard.

Q. Was it of gale proportions?

A. Yes, we considered it a whole gale, a whole gale is a force of 10 or 60 or 70 miles an hour, or 60 miles an hour anyway. And it is such force that the tops of the seas are blown off; as the seas build up the wind will sweep the top off. The seas, of course, build up very high under winds like that. We were holding the ship; of course she was laying broadside in the seas and to the wind, and we couldn't go full speed ahead because if we tried to go ahead on the engines too much, it got too much strain on the wire, would tend to pull the chain and wire completely out of the sea, so as we were pretty far off shore we were able to ease down a bit to keep the wire from parting and we

(Testimony of James Ralph Reichel.)

were making sternway, of course, going ahead on our engines, but actually going backwards over the bottom.

Q. Did the Neptune arrive on that night?

A. The Neptune arrived that night, yes.

Q. That is the 14th. She apparently got a line to the Herald that night?

A. Yes, the Neptune made several passes on the ship. Of course, we were laying off to one side and we could see her and [34] they tried to pass them a line up to the Herald of the Morning. By radio contact with the Neptune we knew she was attempting that and it had——

Mr. Morse: Just a moment. We object to that.

The Witness: O.K., I am sorry.

Mr. Morse: Did you personally observe these things?

The Witness: No, I said by radio contact, sir, we were advised such and such happened.

Q. (By Mr. McKeon): Talking about a radio contact, you mean telephone?

A. Radio telephone, yes.

Q. Radio telephone.

A. But we saw him maneuver near the side of the Herald of the Morning.

Q. She didn't succeed in getting a line aboard that night, did she?

A. Well, she did not take him in tow.

Q. What happens to a tug when she is in irons?

A. Well, when a tug is in irons, it is in a position

(Testimony of James Ralph Reichel.)

where you can't steer it, you can't handle it. In other words, assuming that you have the rudder hard left and the engines going ahead and she will still tend to go to the right, the bow of the boat will fall to the right. In that case you are in irons.

Q. Pretty much powerless?

A. Yes, you can't maneuver your boat. [35]

Q. Was your tug in irons that night?

A. Yes, it was.

Q. And on other occasions of this service, was your tug in irons?

A. Yes, it was several times during the——

Q. Now, the Balsam was standing by there throughout the night of the 15th, too?

A. Yes.

Q. Was she standing off, or where? Was she cruising around, maneuvering around?

A. Cruising around. At times she would come fairly close, other times she would get as much as a mile or so away.

Q. Were you able at all to control the tow in that weather in the sense of having absolute control over her?

A. No, we didn't have absolute control over her, but still had a hold of her so that she wasn't just drifting absolutely free.

Q. Yes. Well, you were doing the best you could on your tug to keep hold of her?

A. Yes, that was our intention.

Q. Now, on the early morning of the 16th, that

(Testimony of James Ralph Reichel.)

is after midnight of the 15th and the early morning of the 16th, did these same weather conditions that you have described to us continue?

A. Yes, the weather conditions continued on through the night. [36]

Q. And what happened to your towing wire on the early morning of the 16th?

A. Early that morning it finally parted.

Q. Where did it part?

A. It parted right at the fair leads.

The Court: Where?

The Witness: Right at the fair leads on the winch drum.

Q. (By Mr. McKeon): That is——

The Witness: When the wires——

Q. (By Mr. McKeon): ——those two up-right—— A. Yes.

Q. Referring to Exhibit, Libellant's Exhibit 4 again, the fair leads are those two roller-like things that the towage board now appears to be in front of?

A. That is right, yes. The wire was coming around this way (indicating) and leading off on an angle out here and it parted right there (indicating).

Q. About how far astern of the fair leads would you say?

A. Parted right on the fair leads. The wire finally smashed itself right there until it parted.

Q. Will you give the Court a description of how that cable or wire appeared after she parted?

(Testimony of James Ralph Reichel.)

A. Well, we knew it was getting bad because as strains kept coming in the wire kept flattening out, flattening out instead of being round, got more and more out of shape, got down like [37] that (indicating), and finally hit one tremendous surge that just parted it right there.

Q. There wasn't any place where that wire there was parted? It was the chafing?

A. No, it was—there was no movement to that wire at that time because the drum had been securely blocked previously to that and the wire was just standing there.

Q. Now, prior to the time that your wire parted, were you having any difficulty in keeping out of irons?

A. Oh, yes, we were practically in irons most of the time. Every once in a while we would work out a little bit, but in irons most of the time.

Q. During that time state whether or not you were shipping seas?

A. Yes, we were taking seas aboard, the after-deck was awash constantly.

Q. Did you have a strain on that wire before she parted?

A. Well, the same strain that had been on there for the preceding couple of days.

Q. Well——

A. A constant strain on there.

Q. Was the strain sufficient—I think maybe you

(Testimony of James Ralph Reichel.)

have testified it was sufficient to lift the entire wire and anchor chain clear out?

A. Yes, between the seas, bring the whole business out of the—— [38]

Q. Now, after that wire parted, what happened to the Herald?

A. Well, she went drifting down with the wind. Of course, we followed along behind it throughout the night.

Q. Was she drifting broadside?

A. She was drifting mostly broadside, yes.

Q. Was she high out of the water?

A. Yes, she was very high; she was a light vessel and correspondingly high.

Q. You mean, a light vessel—you mean without cargo? A. Without cargo.

Q. Or ballast? A. Yes.

Q. Was the Neptune standing by then, too, at the time the wire parted?

A. Yes, she was within, oh, I would say, half a mile or a mile radius of where we were.

Q. And where was the Neptune—where was the Balsam?

A. She was in the same vicinity.

Q. Same general vicinity? A. Yes.

Q. I assume that it isn't too good to get too close to a vessel in that situation?

A. No; you wouldn't want to get any closer than was necessary to keep them in sight.

Q. Could you give us an estimate of how the blow was that night [39] in miles, let us say?

(Testimony of James Ralph Reichel.)

A. Well, of course, as you know, my own estimation, which I would say—I would say it was blowing 65 miles an hour, approximately. I say approximately through my own estimation. I should say 65 miles an hour. I had no device for measuring.

Q. And how was the height of the seas at that time?

A. Well, again I would estimate the seas between 30 and 40 feet high. I know that after the wire had parted, the Neptune was laying alongside of us and between the seas we couldn't even see the tops of her masts.

Q. During the time you put out after the Herald, did the same weather conditions continue?

A. I didn't understand that.

Q. After the wire parted, you were put out after the Herald, she was drifting, as I understand it?

A. Yes.

Q. Which way was she drifting, toward shore or out to sea?

A. She was drifting up the coast and toward the shore; not directly, but on an angle.

Q. Did the same weather conditions prevail?

A. Yes, those conditions prevailed throughout the remainder of the night.

Q. Now, the next morning at daylight did the Neptune attempt to get a line aboard the Herald?

A. Yes, we were watching the Herald of the Morning, of course, [40] the Neptune and the Coast Guard cutter.

(Testimony of James Ralph Reichel.)

Q. Will you tell the Court just exactly what happened?

A. Well, the Neptune—we were laying back astern and on the port quarter, which would be the ship over here (indicating), and we were back here, and we were watching it, drifting down together, and the Neptune went up to the Herald of the Morning and was attempting to put a line on his bow. And he was there quite a long time and we could see lots of activity, both on the bow of the ship and on the towboat, and——

Q. This was at daylight?

A. Oh, this was daylight, yes. The weather had moderated a bit, but still plenty rough and very high seas. And they seemed to have a wire up to the ship from our viewpoint, and there was lots of maneuvering back and forth for a period, seemed like almost an hour, and then all of a sudden the two vessels came together and the bow of the Herald of the Morning struck the starboard side of the tug and as soon as they hit, of course, they drifted apart.

Q. Then what did you do on your tug? What did your tug do after that?

A. Well, we were—had our radio set to the other vessel. We were listening to the talks going back and forth between the Coast Guard cutter and the boats on the scene and the master of the Neptune said that he had been struck and he had been out of the scene a little while and he, as he drifted

(Testimony of James Ralph Reichel.)

clear, and in [41] a couple of minutes he said that they were in a serious condition and needed a collision mat and would the Coast Guard supply them with a collision mat. This is all by radio, you understand; we were listening in on these conversations, and the Coast Guard said yes, they did, and they maneuvered both boats around until they got the collision mat passed over to the Neptune. By that time she was way down, her decks were awash, her boat deck was awash, one side; she was listed over, and it was too late for the collision mat to be of any use to them, you see. Mind if I explain what a collision mat is?

Mr. Morse: We are all interested.

A. A collision mat is a mat which is put on the outside of a ship to fill up a hole in a side of that ship and as long as there is air inside the vessel and the water running in, it will tend to suck in on that position, but once it is filled in it won't do any good, no suction to hold it there. That was the condition that had come before they got the collision mat so they could not use it.

Q. Well, after that did you stand by the Neptune?

A. Oh, yes. We cleared our lifeboat away and got our life-saving equipment we had aboard ready to use in case they started to go down, and just stood by, waited to see what happened. We were very close to the Neptune at this time. In fact, we were so close that Captain Sprague there called over to us just by voice and said, "You better

(Testimony of James Ralph Reichel.)

tell the Coast Guard to come [42] over and get us off." So we radioed the Coast Guard and they came over and removed the crew of the Neptune to the Balsam.

Q. By what means was that done?

A. Well, they used a rubber liferaft—a rescue raft would be a better word.

Q. They did get a line to the Neptune and by means of that line running to the Balsam, they floated the liferaft?

A. Floated back and forth between the two in a never-ending line. It was a double line——

The Court: A double line?

The Witness: Yes, sir, one line to pull it over and one to pull it back.

Q. (By Mr. McKeon): The men of the Neptune were removed from the Neptune, aboard the Neptune, in what manner?

A. Two at a time when they got the entire crew off, except the captain, and he came at the last by himself.

Q. That was Captain Sprague? A. Yes.

Q. And what eventually happened to the Neptune?

A. Well, when they got all aboard the Balsam they contacted us by radio and told us to stand by the Neptune until such time as she sank and that they were going down to the Herald of the Morning; she had just almost disappeared over the horizon by that time. So we stood by and waited

(Testimony of James Ralph Reichel.)

until the Neptune sank. She was a menace to navigation there without someone to [43] show where she was.

Q. Did the commander of the Balsam direct you to stand by the Neptune?

A. Yes, that was his orders to us.

Q. At the time the Neptune sank, or up until she sank, the Balsam was not standing by?

A. No, she had disappeared in the direction of the Herald of the Morning.

Q. The Herald of the Morning was drifting, was she?

A. She was out of sight by the time the Neptune sank.

Q. Yes. And then after the Neptune sank and you were finished with that assignment, what did you do, talking about your—I mean your tug?

A. Yes, I know. We immediately contacted the Balsam again to see what they were doing, see what was next in line. So they reported that they were at the scene of the Herald of the Morning, that she was drifting, so we asked where she was drifting and we were advised that her present course and rate of drift, she would be aground by midnight. So we made for that position, set our course for that position where she was at that time.

Q. And did you eventually come up to the Herald of the Morning and the Balsam?

A. Yes, we came up to the scene there and of course the Herald of the Morning was still drift-

(Testimony of James Ralph Reichel.)

ing and she was getting in rather [44] shoal water, so we went alongside the C-2, that is, the Herald of the Morning at that time and advised them to drop the anchor and see if she would hold there for the night. Of course, we knew there was more aid and assistance coming the next day.

Q. Then you spoke to the Herald?

A. Yes, we went right up alongside as close as you can, within reason.

Q. Yes, shouted through a megaphone.

A. Shouted through a megaphone and also tried to pass messages by flashing lights.

Q. And were you on deck at that time?

A. Yes, I was.

Q. Was any direction passed on to the people on the Herald?

A. Yes, we passed on directions to let go of the anchor at that time and the vessel did not want to let go of the anchor for some reason. After much arguing back and forth we accepted responsibility for the anchor, feeling the anchor wasn't worth as much as the ship, and he let go of the anchor.

Q. That was the port anchor?

A. That was the port anchor.

Q. Did you give any directions as to how many shots of chain?

A. Yes, I recommended a drop, they drop nine shots, to leave one shot in the lock, which eventually was done.

Mr. Morse: For the Court's information, a shot is 15 [45] fathoms, 90 feet? A. 90 feet, yes.

(Testimony of James Ralph Reichel.)

Mr. McKeon: Concurred.

Mr. Morse: I wanted to ask myself.

Q. (By Mr. McKeon): Finally they let go that port anchor? A. Yes.

Q. And did that vessel drag that anchor?

A. When they first let go, I don't think they dropped quite nine shots. It appeared to us to be dragging, rather hard for us to tell, so we went back again and asked that they drop nine shots. At that time she seemed to hold. Of course we were afloat ourselves, it was pretty hard to tell, but we checked with the Balsam, which was lying alongside there at the time through the night to make sure she was holding and he claimed she was holding and they did not appear to be getting near the beach, so I guess they were holding.

Q. After your arrival there, did you attempt to get a line to the Herald?

A. Yes, we maneuvered up alongside of her star-board side, forward end, and just laid broadside with them and fired a shot toward the vessel. Of course, it was very dark that night and lots of line, and the shot line did not get on the vessel, so they couldn't take anything from us.

Q. When you say a shot, you mean a Lyle gun?

A. Used the Lyle gun and aimed it for the deck of the vessel, [46] the forward deck of the vessel, to fire a line across to the men on the vessel so that we would have a line between the two of us.

Q. There is a line attached to that shot?

A. Yes.

Q. And carries——

(Testimony of James Ralph Reichel.)

A. It carries that line across, yes.

Q. Going back to the time that your wire parted on the early morning of the 16th, at that time was your wire made fast to your towing bitts or your drums? Was it on the drum?

A. The wire was made fast to the drum.

Q. It was on the drum? A. Yes.

Q. It was not on the towing bitts? A. No.

Q. We come to the 17th. How were the weather and seas early that morning? This is the morning after you caught up again with the Herald?

A. Well, the seas were beginning to go down in size at that time, but it was still blowing.

Q. Now, that day the Balsam left the scene and took the survivors of the Neptune ashore?

A. I assume they did. They left the scene.

Q. They departed. They admitted, of course, that is what she did? [47]

Mr. Morse: Yes, we have the testimony of the Coast Guard vessels, which identified the exact times they left and what they did, and so forth.

Q. (By Mr. McKeon): Now, on the early morning of the 17th the Coast Guard cutter Winona arrived on the scene, did she not? A. Yes.

Q. And prior to the arrival of the Winona, what were you doing the balance of the night of the 16th and early morning of the 17th?

A. Just kept cruising around in the ship, just holding our position somewheres near where we could keep a good view of her, but still not coming in contact with her.

(Testimony of James Ralph Reichel.)

Q. As you said two or three times alongside, you don't mean literally alongside the vessel?

A. I guess I should clarify that. It is to stay far enough away so that you wouldn't come together and hit each other.

Q. Now, what, if anything, did the Winona do some time after her arrival on the morning of the 17th?

A. Oh, the Winona passed a manila line from her stern to the bow of the vessel.

Q. Of the Herald?

A. Of the Herald of the Morning, and then she shot a line over, this is a small line, and to another line, about four lines are used eventually—they passed the bitter end of the hawser to us. [48]

Q. Was that a 12-inch manila line?

A. A 12-inch manila line.

Q. Did the Winona anchor out ahead of the Herald?

A. Yes, she anchored and slacked out with her chain against the bow.

Q. Did she shoot a wire to the Herald?

A. Shot a small line, heavy lines to follow.

Q. And then she did the same with you?

A. That is correct.

Q. And you then took the bitter end of that twelve-inch hawser and made it fast on your towing winch?

A. We made it fast to the base of our towing machine.

(Testimony of James Ralph Reichel.)

Q. To the base of your towing machine?

A. That is the strongest point on the towboat, is the—of the towing machine.

Q. And then what did you do after you made that manila fast with respect to the *Herald*?

A. Maybe I should clarify it first. What we did was, we had a double pennant aboard which had a big ring in one end and of course eyes on the other ends, and we made the manila fast to this double pennant, made the pennant fast to the base of the towing machine in such a manner that the wire, only the wire would touch the vessel, touch our vessel.

Q. Then what did you do after you——

A. Then we just lay out ahead of them to get a slight strain [49] on slow speed ahead on our engines to relieve the weight on the anchor.

Q. You mean helping to relieve the strain on the anchor gear?

A. Yes, we went slow ahead on our engines. That took part of the strain off of the anchor, which was holding the ship.

Q. That was that port anchor that the *Herald* had down? A. That is correct.

Q. During that afternoon, that day, what have you to say with respect to the weather and seas, if anything?

The Court: 17th?

Q. (By Mr. McKeon): The 17th, your Honor, yes.

(Testimony of James Ralph Reichel.)

A. That is the same day we took the line from the Winona.

Q. While laying there holding onto the Herald?

A. Well, the weather was improving at that time.

Q. How about the seas?

A. Well, the seas were going down gradually. Of course, the wind will cut off long before the seas will go down.

Q. How about the swells? Were there any swells? A. The swell was still running.

Q. Approximately how long did it take the Winona to get that line fast aboard the Herald and the bitter end to you, approximately?

A. Two or three hours, I would say, approximately, but I wasn't watching a clock at the time.

Q. Did the Winona stand by during this time while you were [50] holding onto the Herald on the 17th?

A. Yes, the Winona stood by until that night when she disappeared, and then the Balsam returned.

Q. Yes. Some time during the night, you don't know just when?

A. I don't recall the exact time.

Q. Did the wind come up again on the night of the 17th, if you can recall?

A. I don't recall.

Q. You want to refresh your recollection?

A. I could by looking at the log. At the present time I don't recall. What day was that?

(Testimony of James Ralph Reichel.)

Q. 17th.

A. According to that log, my log entries here, the weather eased down that evening.

Q. Eased down. Now, we come to the 18th. What time did the Hercules arrive?

A. The Hercules arrived that morning, oh, I don't know exactly what time it was, about 4:00 or 5:00 or 6:00.

Q. Early morning?

A. Early morning, before dawn.

Q. That is close enough. Was the Balsam standing by then when the Hercules arrived?

A. I don't recall.

Q. At daylight did the Hercules attempt to get a line aboard the Herald? [51]

A. Yes, the Hercules went up along the vessel and maneuvered around her bow—talking about this alongside again. I am sorry, I should make it more clear, I presume.

Q. No, I just don't want any misunderstanding.

A. Maneuvered as closely as he could, possibly could, in order to pass this heavy wire from the stern of his vessel to the bow of the ship.

Q. Do you know how many attempts she made, that is, the Hercules? A. I don't recall.

Q. Maybe I better show that by other witnesses. She eventually got a line aboard?

A. Eventually she had a wire up and paid it out.

Q. Did she shoot that, so far as you know?

A. I do not know.

(Testimony of James Ralph Reichel.)

Q. Now, in your opinion, did the presence of all your manila hawser there to the Herald, impede or interfere with the maneuvers of the Hercules in attempting to get a line aboard?

A. Yes, it would, because she came up on the bow, she would be unable to cut across from the other side because of our line leaving the head of the vessel.

Q. It was an added danger to the situation?

A. Yes, if she came in on one side, have to completely turn around and come out the same [52] way.

Q. Did you observe whether, when the Hercules was undertaking this task, whether or not she was taking any seas or whether her decks were awash?

A. No, I could not see her stern.

Q. In doing what the Hercules did in those conditions, or under those conditions, would you state to the Court whether in your opinion she was running any risk of loss or damage or injury?

A. Well, yes, the same thing could happen to her as happened to the Neptune. She could strike the vessel or the vessel strike her and could cause damage or loss to the vessel, or passing of a wire is a dangerous job because it can cause loss or injury of men aboard the towboat, too.

Q. It wasn't as great a risk as the Neptune was alleged to take?

A. No.

Q. Now, after the Hercules secured her wire aboard the Herald and it was made fast aboard the Herald, what happened?

(Testimony of James Ralph Reichel.)

A. That took quite a long time to get completely shackled up and to pay out the wire, and in the meantime the weather was increasing, the seas were coming up again and the wind was increasing, so as we were laying on the head of the vessel, just going slow ahead, well, we got to the position where by having our rudder hard over we still couldn't hold our position ahead. [53]

Q. Did you get in irons again?

A. Started to come in irons.

The Court: This was the 17th?

Mr. McKeon: No, this is the 18th, your Honor.

A. (Continuing): We were going to start towing again.

The Court: That would be the 18th?

The Witness: The 18th.

Mr. McKeon: The Hercules had arrived, your Honor.

The Court: All right.

A. (Continuing): And of course he paid out his hawser until he had used the same amount of hawser as we had manila out, laying alongside each other, and both of us were trying to keep clear of each other, but as we had our rudder hard right, coming in with the engine, we started going to the left and coming completely around.

Of course, we contacted the Coast Guard and told them to let the people on the ship know, let go of their anchor, the chain, space the chain so that we can pull the ship around and get under way, but

(Testimony of James Ralph Reichel.)

then there was some sort of difficulty and couldn't get the chain away. So——

Q. That is the chain on the—anchor chain on the Herald?

A. On the ship. So we swung right around to the position where the ship was heading in one direction and both towboats were headed the other direction, stern to stern. In other words, the stern of both boats were in line with the stern of [54] the Herald of the Morning. Is that clear?

Mr. Morse: Is it clear to the Court?

The Court: So far as—only accepting his statement.

Mr. McKeon: What the witness has asked, is that clear? I think he has in mind, has he made it clear what the difficulty was between the two tugs?

The Court: You just tell us what you observed.

The Witness: Yes, that is what happened, so we—and then with the ship heading in this direction and us heading in this direction and the manila line was laying from the bow of the ship right alongside the ship and back up to our stern.

Q. Both tugs were in irons?

A. That is correct.

Q. Was there danger of a collision between the two tugs at that time?

A. Oh, yes, very great chance that we could come together.

Mr. McKeon: I don't know whether your Honor wants to adjourn at this time. I am not quite——

The Court: I will run further if you wish.

(Testimony of James Ralph Reichel.)

Q. (By Mr. McKeon): What did they eventually have to do, if you know?

A. All I know is what I heard through the Coast Guard radio.

Q. If you don't know of your own knowledge——

A. I know the chain was eventually let go.

Q. That is the anchor chain? [55]

A. Yes, and——

Q. They let the anchor go to the bottom?

A. The ship came around and followed behind us and we proceeded up the coast.

Q. You and the Hercules?

A. The Hercules and the Sea Fox towing together.

Q. Now, after the men on the Herald let go of that port anchor chain, that did mean that that port anchor was on the bottom?

A. Oh, les, the anchor and the chain attached to it.

Q. The chain and everything went?

A. Yes.

Q. In that situation the Herald then was without a usable anchor?

A. That is correct, nothing visible, no chain visible.

Mr. McKeon: Well, I think that would be admitted, Mr. Morse.

Mr. Morse: Yes, we admit they only had one usable anchor.

(Testimony of James Ralph Reichel.)

Q. (By Mr. McKeon): From that time on she was helpless so far as the use of the anchor is concerned? A. Yes.

Q. You were far enough away from the stern of the *Herald* at the time they let the chain go that you weren't imperiled by length of chain?

A. No, we couldn't see the chain being let go because we were laying with our stern to the stern of the vessel. [56]

Q. Do you know what happened to the starboard chain on that ship?

A. The starboard chain had been used up in the previous towing attempts, at least we assumed it was all used.

Q. She was then without any chain on the starboard side or any chain on the port side?

A. That is correct.

Q. And as a result, neither the *Hercules* nor the *Sea Fox* could make any hawser fast to that anchor chain?

A. No, we—I shouldn't say we—passed, but the line we made fast to was passed onto his deck and how she made it fast we don't know, because we could not see up there.

Q. The same thing is true of the wire of the *Hercules* that had been passed up, that it was made fast some place on the deck?

A. Disappeared on deck, don't know how it was made fast.

Q. And of course, that isn't as desirable a

(Testimony of James Ralph Reichel.)

method of making fast a towing wire as if you had the anchor chain?

A. Oh, no, because there is no spring action which the anchor chain will give to it.

Q. In your judgment, would it be prudent in those conditions to start out with towing the Herald with a twelve-inch manila hawser?

A. It was not; at that time we switched and put the twelve-inch hawser on we did not think it would be good seamanship to proceed on that alone. [57]

Q. And your towing machine at that time had been so damaged that it wouldn't have been used by you except in a desperate situation, I assume?

A. We could not have used the towing machine at all, because we couldn't have turned the drum.

Q. After you got under way, you and the Hercules got under way with the Herald of the Morning, made fast as you have described it, please tell the Court what you experienced, the weather conditions.

A. Yes.

Q. And so on.

A. As I mentioned before, when we first started out, the weather was increasing and it continued to increase throughout the rest of that evening and that night, and it blew pretty hard, blew, I should say, 60 miles an hour at that time, and following seas which would occasionally come aboard our stern of the boat and fill up the afterdeck and then run off, but we were proceeding up the coast at—I know that we were towing at reduced revolutions

(Testimony of James Ralph Reichel.)

to minimize the strain on that manila so we couldn't part it.

Q. Bearing in mind that blow and also having in mind the position in which the Herald was anchored, the port anchor, in your opinion, do you think if the Herald had remained at anchor that she would have been able to weather that blow?

A. Well, in my opinion, I would say no, she wouldn't. I know [58] that I would not care to be aboard the ship that was laying there with one anchor.

Q. In that sort of a blow?

A. In that sort of a blow; there is a good possibility she would drag.

Q. Well, the possibility she might carry the anchor away, too, isn't there?

A. That is a possibility, too. Most likely she would drag the anchor.

Q. Apart from that night on the 18th, when you encountered that blow, have you anything else to tell us with regards to the events of the balance of the voyage on to Everett?

A. Well, when we got around Cape Flattery and the Straits of Juan de Fuca, so we got up—I forget—when we got in the Straits and we noticed the ship kept laying to one side and couldn't quite figure out what was doing that, but we had noticed when the ship was at anchor her rudder was banging back and forth and it must have gotten jammed over on one side or the other, hard over, which,

(Testimony of James Ralph Reichel.)

as we were pulling her, the water tended to force the ship out to one side, but that was no great problem; we just allowed for that and got up to Everett all right.

Q. By the way, was that rudder lashed securely when you started out from Oakland?

A. Well, I assume it was, sir. I did not inspect the vessel. [59]

Mr. McKeon: I think it will be admitted, Mr. Morse, that they tried to make it fast?

Mr. Morse: Yes.

Mr. McKeon: Secured that rudder——

Mr. Morse: We will even stipulate it was made fast.

Mr. McKeon: Yes. Just don't like to be going into things that there can't be any question about, if I don't have to.

Q. About what time did you put her alongside in Everett?

A. Oh, it was early evening, I guess.

Q. The 19th?

A. About 7:30 or 8:00 o'clock at night.

Q. That was the 19th?

A. I would have to check again on the dates.

Q. Please.

A. Yes, down here 9:30, vessel alongside dock.

Q. On the 19th? A. The 19th.

Q. And what time did you get back, arrive back in San Francisco?

A. It was about the 24th or 25th—just a second. The 24th.

(Testimony of James Ralph Reichel.)

Q. Of November? A. November.

Q. During these times of very heavy weather that you have described, will you tell the Court whether or not the personnel of your tug was in any danger? [60]

A. Yes, the personnel were in danger of being washed aboard when working down on the after-deck, of course working down by the towing machine, the time that that tremendous strain was on the wire. There was always the possibility that wire parting at that time and the loose ends flying around and hurting the men, or worse. Of course, there was always the possibility, too, of the boat actually floundering.

Q. You actually were shipping green seas, were you? A. Yes.

Q. With only one anchor in use and without any power or rudder, would a vessel of the size of the Herald be, in your opinion, in any danger after a towing hawser parted

A. Yes, she would be in great danger if she were drifting toward a leeshore; drifting offshore, it would have been all right, because they could have drifted for days, no damage happen to them.

Q. But if you are drifting toward the shore——

A. If you are drifting toward the shore, they are in great danger.

Q. How was she drifting in this case?

A. In this case she was drifting toward the shore.

(Testimony of James Ralph Reichel.)

Q. In towing at sea, have you had occasion to experience the necessity of easing down on your engines and slowing down on your engines and sort of nursing the tow along?

A. Oh, yes, that happens often when seas increase in size. [61]

Q. And why is that necessary?

A. Well, if you reduce the number of revolutions on the engines, you reduce the strain which is imparted upon your towing machine, your towing wire and your shackles and the entire towing gear.

Q. Yes. Did you follow that practice on this voyage? A. Yes, we did.

Q. Do you know whether or not your tug was in communication with weather stations while you were proceeding?

A. Yes, as we proceeded up the coast we listen to the weather reports which come over every morning and every evening.

Q. Have you towed vessels at sea with the same type tug as the Sea Fox? A. Yes, I have.

Q. Frequently? A. Quite a few trips.

Mr. McKeon: I think that is all.

The Court: We will take an adjournment until 10:00 o'clock tomorrow morning.

Mr. Morse: Mr. McKeon, you will have the log available tomorrow?

Mr. McKeon: Yes.

(Thereupon an adjournment was taken to tomorrow, Thursday, January 18, 1951, at 10:00 o'clock a.m.) [62]

Thursday, January 18, 1951—10:00 A.M.

The Clerk: Puget Sound Tug & Barge Company v. Waterman Steamship Corporation, for trial; and Shipowners & Merchants Towboat Company v. Waterman Steamship Corporation, for trial.

Mr. Morse: Ready.

Mr. McKeon: Ready.

JAMES RALPH REICHEL

resumed the stand on behalf of the libelants; previously sworn.

The Clerk: James Reichel on the stand, heretofore sworn.

Mr. McKeon: If the Court please, Mr. Morse and I have discussed the matter of filing the amendment to the Shipowners' libel to join as a party libelant the tug Sea Fox Corporation, the name of which is on the certificate of title. I don't think it is strictly necessary, but there is no objection to doing it, stipulate it may be deemed amended to include the owner of the tug Sea Fox and I will file a formal amendment.

Mr. Morse: So agreed.

Mr. McKeon: I have one or two questions.

Direct Examination
(Continued)

By Mr. McKeon:

Q. Mr. Reichel, what was the condition of the wire when you first departed?

(Testimony of James Ralph Reichel.)

A. Condition of the wire when we left San Francisco?

Q. Yes. A. It was a good wire. [63]

Q. With regard to the way the Herald was acting, will you describe that to the Court, in the bad weather?

Mr. Morse: At which time now, Mr. McKeon?

Mr. McKeon: Well, let us take the time that you first ran into some heavy weather. I think you said off Point Arena. What was she doing and how was that reacting on her?

A. The Herald of the Morning was shearing from side to side across our stern. She first lay over to the starboard side and then lay to the port side.

Q. Running up on you——

A. Running way over to the side and tend to run up and fall back and up on the other side.

Q. What was the effect of that upon that towing wire?

A. Well, it causes the wire to travel back and forth across the stern of the boat, being off first one side and then the other side.

Q. At that time did you lose your towing board?

A. Yes, our towing board went overboard.

Q. What was the prime cause of the tow acting that way?

A. Well, the force of seas and winds upon the ship tended to make it lay first one way and then the other way.

(Testimony of James Ralph Reichel.)

Q. Anything the tug could do about that?

A. No, nothing you could do.

Q. Did you have any trouble with your steering engine——

A. No. [64]

Q. ——on the Sea Fox? A. No.

Q. In your judgment, would it have been wise, a prudent or good seamanship, to try to put into the Columbia River, across the Columbia River bar at any time after you had gotten the bad weather, the 13th, 14th, 15th and 16th?

A. No, it would be impossible to cross the bar in heavy weather. The only time you cross the bar is in good weather.

Q. And in what you were experiencing during that time, in your judgment would it have been prudent to have attempted to go in?

A. No, it would not. The best thing we could do would be to hit for the offshore, get more seaway.

Q. Is that what you did?

A. That is what we did.

Mr. McKeon: That is all.

Cross-Examination

By Mr. Morse:

Q. Captain, what year was it that you obtained your master's license? A. 1945.

Q. Have you served as a master of sea-going tugs? A. Not on a sea-going tug, no, sir.

Q. You have served as mate? A. Yes, sir.

Q. And for how long a period prior to this incident did you [65] serve as a mate?

(Testimony of James Ralph Reichel.)

A. Two years.

Q. You started serving as mate some time in 1946?

A. That is correct, sir.

Q. Prior to that time had you served in any other capacity in a sea-going tug?

A. No.

Q. When towing a vessel such as the *Herald of the Morning*—by the way, the *Herald of the Morning* was at that time a baby flat-top carrier, wasn't it?

A. No, sir, I don't—I think she was a cargo ship, used as a troop transport cargo ship. I think she was a C-2 type vessel.

Q. Then I wish my opening statement corrected, as I think I said she was a baby flat-top carrier. She was a Navy type transport of some character?

A. Yes, sir.

Q. Which is a C-2 hull?

A. Yes, sir.

Q. Now, will you explain to the Court what a C-2 type vessel is? It is a pretty big cargo vessel?

A. Yes, a C-2, not having served upon them, I don't know how long they are, but approximately 400 feet long.

Q. I think probably the Judge is familiar with the so-called Liberty-type vessels which were built during the war. The C-2 [66] type vessel is a little bit larger?

A. Just a slight bit larger than a Liberty.

Q. So we are talking about a big sea-going vessel, aren't we?

A. Yes, sir.

Q. Now, have you ever towed or been aboard a

(Testimony of James Ralph Reichel.)

tug which has towed a large cargo vessel in a previous instance? A. Yes, sir, I have.

Q. And how was the tow hookup made in those previous instances?

A. In the previous instances we towed in the same manner we towed the Herald of the Morning.

Q. So that one anchor chain was used to which your towing wire was attached?

A. That is correct, sir.

Q. So is it a fair statement to say that it is a customary practice when towing these large vessels to use one anchor chain in the tow makeup?

A. Yes, it is.

Q. And therefore, there would normally be only one anchor available to anchor the vessel in the event of distress? A. That is right, sir.

Q. That would be a customary practice?

A. Yes, sir.

Q. Now, after you had gotten out of San Francisco on this voyage, what length towing wire—what was the distance between the Herald of the Morning and the Sea Fox when you were all [67] set for your tow?

A. Well, 1,000 to 1,200 feet, approximately.

Q. Well, would it vary?

A. No, sir, but I didn't measure it as we paid out the wire.

Q. Now, what portion of that overall distance was wire and what portion was anchor chain?

A. Well, I should clarify myself, before I was

(Testimony of James Ralph Reichel.)

figuring only just the amount of wire out being 1,000, 1,200 feet. I think the ship had two shots of chain in the water, probably three shots of chain out.

Q. Three shots of chain? That would be 45 fathoms? A. I believe that is what was done.

Q. Three shots of chain, 45 fathoms—now, I understood you earlier, you said your towing wire was 1,200 feet?

A. Approximately, yes, sir.

Q. And as I also understood you, you had about half your towing wire on the winch in order to secure the towing wire to the Sea Fox?

A. No, sir. Under usual conditions, which that was, the usual conditions, then we leave $21\frac{1}{2}$ turns on the drum to secure it with.

Q. And about how many feet would two and a half turns be? Less than 50 feet, I assume?

A. No, sir, I would have to think for a second on that. I would say 200 feet. [68]

Q. All right. Say you have 200 feet. What is the dimension of your drum, the diameter of your drum?

A. Oh, three to four feet. It is very hard to picture it just exactly how big.

Q. All right. Well, irrespective of that, you were using roughly, say, 12, say 1,000 feet of wire from the stern of the Sea Fox? A. Yes, sir.

Q. And would you say that was the proper length of wire under the circumstances?

(Testimony of James Ralph Reichel.)

A. Yes, sir.

Q. If you used a shorter length of wire, you would have more trouble with your—danger of breaking your towing wire, isn't that correct?

A. Yes.

Q. And the purpose of the length is, plus the chain, is to act as a strain, isn't it?

A. That is correct, sir.

Q. Now, you were north of Drake's Bay when your wire broke, weren't you? A. Yes.

Q. And where did the wire break?

A. Oh, I would say we were about thirty miles south of Point Arena.

Q. All right. My question was directed more—was it close to [69] the drum or toward the chain or where was it?

A. No, it was by the stern of the boat.

Q. Right where the chain goes over her stern board?

A. I think where the wire goes over the stern.

Q. I beg your pardon? A. Yes, sir.

Q. What weather were you experiencing at that time?

A. At that time we were experiencing very rough weather.

Q. Do you have your log there?

A. No, I do not.

Mr. McKeon: I have it.

Q. (By Mr. Morse): While Mr. McKeon is getting the log out, how long a period have you

(Testimony of James Ralph Reichel.)

sailed along the coast between here and Puget Sound?

A. Well, I was with the American-Hawaiian Steamship Company prior to the war for quite a while, and after the war, and we sailed intercoastal. Part of our trip was, of course, from here to Seattle.

Q. It is a fair statement to say that the Pacific off the coast of Oregon and Washington does experience pretty heavy weather in the wintertime?

A. At times, yes, sir.

Q. Would you say that November is a calm season of the year in that area?

A. No, sir, I wouldn't say it was a calm season, no. [70]

Q. Storms might normally be anticipated?

A. Well, going to sea you can expect a storm any time, any place.

Q. I appreciate that, but from past experience, November is a season when storms are expected in that area?

A. I would say the storms can be expected, yes.

Q. Now, turning to your logbook, turn to the date when the towing wire broke, north of Drake's Bay.

A. Yes, sir, November the 7th.

Q. What time was it that the towing wire broke on that date?

A. 3:15.

Q. In the morning?

A. No, p.m.

Q. What was the wind force at that time?

A. Let's see. I don't see any—let me read this. Well, all I can give you is the watches, 4:00 to 8:00 watch, 8:00 to 12:00 watch.

(Testimony of James Ralph Reichel.)

Q. Very good. That is——

A. Two reports at that time, 4:00 to 8:00 watch says, “Fresh to strong northwesterly breeze, rough sea and heavy swell.”

The Court: What is the other?

The Witness: You want the rest of it? “Tug rolling heavily. Tow lying in trough, making one knot sternway.”

8:00 to 12:00 watch: “Strong northwest wind, big sea and swell. Tug rolling heavy.” [71]

Mr. Morse: I would like to have this log marked for identification, if the Court please.

The Court: It may be admitted and marked.

Mr. Morse: Now, after the line broke south of Point Arena there, did the Sea Fox tow the Herald of the Morning back into Drake’s Bay?

A. We went back along the side of the ship, next to the ship and spoke to the ship, and they had to clear the anchor chain, the part that was hanging in the water. That took quite a bit of time, quite a hard job to do, so they worked practically all that night until the following morning. The following morning we passed them a wire and then we started with them, but our wire got caught on our drum, so we held them until the Sea Prince came out and the Sea Prince took them in tow into Drake’s Bay.

The Clerk: Respondent’s Exhibit A marked for identification.

(Whereupon the log above referred to was

(Testimony of James Ralph Reichel.)

marked Respondents' Exhibit A for identification.)

Q. (By Mr. Morse): What happened to the approximately 1,000 feet of wire which was on the end of the chain? Was that recovered or was that dropped in the ocean?

A. No, sir, when that let go the anchor chain, of course that wire and the chain went straight down.

Q. Do you know whether you instructed them to drop it or [72] whether they did it of their own volition? A. I think we instructed them to.

Q. All right. Now, which wire was it that you used to assist them into Drake's Bay?

A. Our spare wire.

Q. The spare wire? A. Yes, sir.

Q. And you say that got mixed up on your drum some way? A. Yes, it did.

Q. In any event you got into Drake's Bay?

A. Yes, sir.

Q. And the Sea Prince was there. Now, as I understand it, the Sea Prince transferred its wire to the Sea Fox?

A. Yes, the Sea Prince made her wire fast to the chain of the ship in Drake's Bay and then she paid out all her wire and passed the bitter end to us.

Q. And in the meantime, what had you done with your second long wire which got mixed up on your drum?

A. We had to cut part of that to get the turns

(Testimony of James Ralph Reichel.)

out. Once you get a turn on the drum, it is almost impossible to pull it clear. They sort of form more. It is like a fishing reel. We had to take off part of it.

Q. In any event, your spare wire was no longer available to you? A. That is correct. [73]

Q. Now, how long was the wire which was transferred to you from the Sea Prince?

A. I believe it was a 1,200-foot wire, too.

Q. What dimensions? A. $1\frac{3}{4}$.

Q. Was it a new wire?

A. It was new wire.

Q. When you proceeded north from Drake's Bay, how much chain was being used and how much wire was being used as you proceeded on your voyage?

A. Well, I believe the ship had three shots of chain.

Q. As you had when you started out from San Francisco?

A. Yes, I believe so. I do not know absolutely sure, because I wasn't on the ship, but we were using approximately 1,000 feet of wire again.

Q. Would a wire of substantially less than that length have been suitable for towing?

A. Well, it could be used, but we have found through experience that approximately 1,000 feet, or leaving $2\frac{1}{2}$ turns on the drum, that length of wire was best.

Q. So your 600-foot—by the way, what was your 600-foot wire? Was it also $1\frac{3}{4}$ -inch?

(Testimony of James Ralph Reichel.)

A. Yes, sir.

Q. That was a used wire?

A. It was a used wire, but a good wire. [74]

Q. But it was too short a length to have served satisfactorily for the tow, wasn't it?

A. It could be used in an emergency. It was just an emergency wire.

The Court: Did you say it was $3\frac{3}{4}$?

The Witness: No, an inch and three-quarters.

The Court: What were the dimensions of the new cable?

The Witness: Same size, sir; $1\frac{3}{4}$.

The Court: And the one you lost?

The Witness: $1\frac{3}{4}$.

Mr. McKeon: That is diameter, your Honor.

The Court: I understand.

Q. (By Mr. Morse): And for the Court's information, when we talk of a manila hawser, then they talk about the circumference, twelve-inch hawser.

Did you communicate with the owners when you broke your wire north of Drake's Bay?

A. Yes, we did.

Q. You have a radio?

A. Radio-telephone, sir.

Q. So it is just like telephoning from this office down to some other building?

A. That is right, sir.

Q. Do you keep a log on your radio conversations?

A. No, we do not. [75]

(Testimony of James Ralph Reichel.)

Q. You did advise your owners that the wire had broken and as a result the Sea Prince was sent out?

A. Yes, sir.

Q. Now, as I also recall, the next time you experienced any weather was commencing about November 11?

A. Yes, sir.

Q. Now, referring now to Respondent's Exhibit A, will you please read into the record the weather as reported by your tug commencing, say—

The Court: On what day?

Mr. Morse: Commencing, say, 12:00 noon on November 11 right through until you got up into Everett, Washington?

A. Well, this would be from the 8:00 to 12:00 watch, which is written at noontime, written after the watch is over.

The Court: On what date?

The Witness: November 11.

The Court: All right.

The Witness: It is: "Clear, strong northwesterly wind, big sea, moderate swell, tug rolling and pitching." And for the 12:00 to 4:00 watch: "Partly cloudy, heavy northwesterly sea and swell, strong northwesterly wind, force 5. Tug rolling and pitching. Tow shearing from port to starboard."

4:00 to 8:00 watch: "Cloudy, fresh to strong northwesterly breeze, rough sea and heavy northwesterly swell. Tug pitching and rolling heavily. Tow shearing from side to side. No [76] headway."

8:00 to 12:00: This will be the nighttime: "Clear,

(Testimony of James Ralph Reichel.)

strong northwesterly wind, heavy sea and swell, tug and ship pitching badly, going astern from 8:00 p.m. to 10:00 p.m. 240 revolutions."

Have the 12th, sir?

Q. Yes. A. Friday, November 12——

Q. May I interrupt? You may be able to speed this thing along, and I assume the Court will ask for briefs. We would like to submit written briefs in the matter. We can refer to this log and refer to the weather conditions and save a little time, perhaps, unless the Court wants to know at this time what the weather was.

The Court: Well, maybe he can pick out the weather briefly and go right through so that there will be no question.

Mr. McKeon: Just confine it to the weather.

The Witness: Going as far as 12:00 to 4:00——

Q. (By Mr. Morse): This is on the 12th?

A. 12th. "Partly cloudy, heavy northwesterly sea and swell, northwest wind, force 5."

4:00 to 8:00: "Moderate northwesterly breeze, moderate sea and heavy swell."

8:00 to 12:00: "Moderate northwesterly breeze, moderate sea and swell." [77]

12:00 to 4:00: "Small northwesterly sea and swell, wind northwesterly, force 2."

4:00 to 8:00: "Gentle northwesterly breeze, gentle sea and low swell."

8:00 to 12:00 was: "Southeast wind picking up, moderate sea and swell."

(Testimony of James Ralph Reichel.)

The Court: That was the 14th?

The Witness: That was the 12th, sir. This will be the 13th.

The Court: Go right on.

The Witness: 4:00 to 8:00 watch: "Gentle north-easterly breeze, small sea and low swell."

8:00 to 12:00: "Northeast breeze, small sea and swell."

12:00 to 4:00: "Light northeasterly wind, small sea and swell."

4:00 to 8:00 was: "Gentle southeasterly breeze, small sea and swell."

8:00 to 12:00: "Strong southeast wind, big sea and swell."

The 14th. There is a lot in here about the towing board going over the side.

Q. Just give us the weather.

A. OK. I don't see much about the weather, all about the——

The Court: Anything at all on the 14th?

A. Well, wind moderate to fresh, southeasterly gale, heavy seas and large swell. [78]

The Court: The 15th?

The Witness: The 15th, commencing at 12:00 to 4:00: "Moderate southwesterly breeze, moderately rough sea and heavy swell." That is the morning. The afternoon it gets down to 12:00 to 4:00: "Moderate south-southwesterly breeze, rough sea and heavy swell."

9:00 p.m.: "Wind increasing in force to south-

(Testimony of James Ralph Reichel.)

easterly, whole gale. Tremendous seas and heavy swells."

The 16th: "Very heavy seas and swell. Blowing southeasterly, force 8."

9:00 p.m. I have down: "Southwesterly force 5."

17th: "Southwesterly 3," and at 8:00 a.m., "Gentle to moderate southwesterly breeze, moderate sea and moderate heavy swell."

That night, 8:00 to 12:00, we have down: "Light southwesterly sea and swell."

4:00 to 8:00 we have down: "Gentle westerly breeze, small sea and swell."

18th: "Overcast, wind westerly, force 3, and moderate westerly sea and swell."

8:00 to 12:00: "Southeast wind, light sea and swell."

12:00 to 4:00: "Moderate southeasterly sea and swell, wind southeasterly, force 3 to 4."

The Court: What do you mean, 3 to 4?

The Witness: Force 3 to 4, sir. [79]

The Court: What is that?

The Witness: Estimated between force 3 and force 4.

The Court: What does that mean?

Mr. Morse: On the Beaufort scale.

The Witness: On the Beaufort scale a force 3 would be 25 miles an hour, I estimate.

The Court: All right.

The Witness: "Southeasterly 5, rough sea and heavy following swell."

(Testimony of James Ralph Reichel.)

Friday, the 19th, at the time of passing Tatoosh, was east, southeasterly wind, force 2, calm sea.

The Court: The storm is over?

The Witness: The storm is over and——

The Court: Proceed.

The Witness: Into port.

The Court: Proceed.

Q. (By Mr. Morse): You were talking about wind forces, and that is on the Beaufort scale?

A. Yes, sir.

Q. Do you recall what the wind forces are on the Beaufort scale?

A. No, I didn't memorize them, sir.

Q. Now, when you speak of wave conditions, have you in your log noted the scale numbers of the wave conditions?

A. No, we don't do that.

Q. You say whether it is a heavy swell or heavy sea or [80] something?

Mr. McKeon: That is not a merchant marine custom.

Q. (By Mr. Morse): When your towing engine broke down on the 14th, where was the Sea Fox at that time?

A. The 14th, the 14th, the day we lost the tow?

Q. No, the 16th, early morning, when you lost the tow. The 14th your towing engine broke down.

A. Oh, the 14th, the towing engine, that is right, the first time the clutch carried away.

Q. Yes, sir.

A. Where were we at that time?

Q. Yes, sir.

A. Proceeding up the coast.

(Testimony of James Ralph Reichel.)

Q. Yes, I know—— A. We were——

Q. Will your log indicate your position?

A. Yes, it would.

Mr. McKeon: 14th, I think, Captain.

A. Yes, trying to find out where we are on here, but it was somewheres near Tillamook Light and south of the Columbia River bar.

Q. Approximately how far?

A. I just, making a guess, I would say 50 miles.

Q. That is close enough for this purpose.

When your towing engine broke down, did you communicate with [81] your owners?

A. No, we communicated with the Coast Guard. Yes, we also communicated with our owners.

Q. And you told the Coast Guard that you had broken down and you needed assistance?

A. That is right.

Q. Your tow engine broke, and what did you tell your owners?

A. Told them the same thing. We contacted the Neptune by ship-to-ship radio.

Q. Yes. A. To——

Q. All right, did you attempt to contact any other tugs to come to your assistance?

A. No, sir.

Q. Did you make any headway during the 14th?

A. I think the 14th—yes, the 14th we did move offshore.

Q. About how far offshore were you, by the way?

(Testimony of James Ralph Reichel.)

A. I think that when the Balsam first arrived upon the scene we were approximately twenty miles offshore, and then worked her out to thirty miles, approximately, offshore.

Q. Were you able to see land at 20 miles?

A. See the Tillamook lighthouse.

Q. Talking about towing engines, now, is that winch that you used, this towing winch, did it automatically pay out and take in line? [82]

A. No, sir.

Q. As the pressure increased?

A. No, sir, it did not.

Q. It was not a type winch of that character?

A. No, sir.

Q. So that if you wanted to pay out line or take in additional line, you had to do it manually—by manual—control it manually?

A. Yes, release the pneumatic brake for a second.

Q. What is your practice as you were towing up the coast—to let out a few feet of line every—once a day or six times a day?

A. Yes, once a watch usually we pay out, maybe slack out a few feet.

Q. Was that done regularly?

A. Yes, sir, that was done.

The Court: Why did you do that?

The Witness: We do that any time there is no towing board on the wire so that the same spot won't be constantly hitting the stern of the boat.

(Testimony of James Ralph Reichel.)

The Court: I understand.

Mr. McKeon: You wouldn't have to do it if your towing board was in position?

The Witness: No, because your towing board would——

Q. (By Mr. Morse): When was it you lost your tow board?

A. Let's see. Sunday, November 14, at [83] 7 a.m.

Q. Did you use a preventer wire at any time?

A. We did use a preventer wire.

Q. A single wire or two preventer wires?

A. No; used a single preventer wire, which was made fast to the base of the towing winch and clamped onto the tow wire.

Q. On the afternoon of the 14th when your towing winch broke down, you had a preventer wire in use at that time? A. Yes, we did.

Q. Did the preventer wire carry away at that time?

A. No, the preventer wire didn't carry away, but the force of the pull of the wire through it, those clamps wouldn't hold it, tended to slow it down, is about all.

Q. Now, what happened on the winch itself when it broke?

A. The teeth in the clutch were torn off.

Q. Was that all the teeth around the entire drum?

A. No, the teeth on the smaller one on the bottom.

(Testimony of James Ralph Reichel.)

Q. Smaller gear on the bottom?

A. Yes, sir.

Q. And when that happened did the drum revolve freely?

A. Well, no, the hand brake was still on.

Q. Is the hand brake alone sufficient to prevent the drum from turning?

A. Well, under ordinary circumstances a hand brake would hold. I mean, it is designed for that purpose, to hold, but under this circumstance it didn't hold, the strain was more [84] than the brake could hold.

The Court: What about the teeth——

The Witness: They connected with the clutch and the clutch has a pneumatic brake on it, the pneumatic brake plus the hand brake holds the drum in position.

The Court: Operate the drum with the hand brake?

The Witness: The hand brake just releases the pressure so it will pay out.

The Court: All right.

Q. (By Mr. Morse): After the teeth were sheared off, did you pay out any line? Were you able for the next few days to pay out any line?

A. Just when it went out beyond our control. We had it jammed in with a piece of metal to hold the drum.

Q. Then, as I understand it, you had that piece of metal jammed in there so it was impossible for it to pay out?

A. Yes, that was the—yes.

(Testimony of James Ralph Reichel.)

Q. So as a matter of fact, then until that piece of metal bent or was carried away that you had jammed in there—— A. Yes.

Q. ——no line was paid out? A. No.

Q. And your hand brake alone was insufficient to—your hand brake alone plus your preventer was insufficient to prevent the line from running [85] out? A. It was at that time, yes, sir.

Q. Were you able to determine how much that line did pay out from the time your teeth on the gears were stripped?

A. I would say all in all we lost about half a lear.

Q. That would be approximately how much?

A. I guess that would be about eight feet per turn, 75 feet.

Q. 75?

A. 75 feet. That is just an estimate. I would have to measure to find out.

Q. I assume that you contacted the Coast Guard and the Neptune immediately upon your teeth being stripped? A. We did.

Q. And the Balsam?

Mr. McKeon: May I interrupt there? I don't want to have any misunderstanding. My understanding is that he did endeavor to communicate with the Neptune, but had some trouble in picking her up. He went immediately to get the message out.

The Witness: Yes.

(Testimony of James Ralph Reichel.)

Q. (By Mr. Morse): How long after the Coast Guard was contacted did the Balsam arrive?

A. I would have to check on the date of that, sir. I would just estimate four or five hours. I can get the exact time, probably.

Q. While we are at it, get the exact time. I think it was a little bit less than that. [86]

A. At 4:20 we contacted the Coast Guard and at 9:45 she arrived. Of course our times were probably, were daylight saving time, I notice on the log daylight saving time, until such time as the Hercules got ahold, then we changed to Pacific time again.

Q. If you had wanted to do so, could you have paid out line subsequent to the time when the teeth were stripped if you wanted to do so?

A. After the teeth were stripped?

Q. Yes, sir.

A. Not after we jammed the winch.

Q. Did you at any of the time have occasion to take the line in while you had the Herald in tow?

A. During the whole voyage?

Q. Yes.

A. Oh, yes, there was times we probably would have hove in a little bit, maybe, I don't recall if we hove in any.

Q. After your teeth were stripped, did you secure it up again on the preventer wire, I assume?

A. Yes, we took — kept taking up on those clamps all along as we went along.

Q. Didn't put on additional preventer wires?

(Testimony of James Ralph Reichel.)

A. No, put on, had about four or five clamps on the same wire, clamped to the wire.

Q. Was the preventer wire of the same diameter as your towing [87] wire? A. Yes, sir, it was.

Q. Do you keep a notation in your logs of the times when you would slack out on your wire?

A. No, we don't.

Q. I understood you to say you did that regularly and every watch?

A. That is—yes, we do when there is no towing board on.

Q. In other words, you don't do it when you have a towing board? A. No, sir.

Q. And you had a towing board continuously up until the morning of the 14th?

A. I believe that was the time.

Q. Now, will you tell me again what height from the trough to the crest those waves were on the 16th when your wire broke?

A. Well, it is an estimate, of course. My point would be looking out from the—from the towboat, but it seems to me that the top of the crest to the trough would be as much as 30 to 40 feet.

Q. And you mentioned, when you were mentioning the size of the waves, you said you were unable to see the Neptune?

A. Yes, I just used that as a figure of speech to show that she would be down in one trough, we would be down in the other [88] trough, a wave in between us, and we could not see her mast.

(Testimony of James Ralph Reichel.)

Q. How far away was she at the time when you were unable to see her mast?

A. A couple of hundred yards.

Q. In other words, you were in a valley and she was also, was in the bottom of another valley?

A. Yes, at that time.

Q. So that you were looking at an angle?

A. Yes, sir.

Q. And unable to see her mast?

A. That is right.

Q. In your line of vision. What length is the Sea Fox? A. I don't know exactly.

Q. Approximately.

A. I would say approximately a hundred and forty feet.

Q. She is a big sea-going tug? A. Yes.

Q. 1200 horsepower?

A. 1200 horsepower.

Q. And the Neptune, was she about the same size or bigger?

A. I believe she is larger.

Q. Is it a fair statement to say that the Sea Fox is a big sea-going tug? A. Yes.

Q. Do you know whether there was any sea-going tugs available [89] in the Columbia River on or after the 14th when you were beginning to have troubles? A. I do not know, sir.

Q. Did you inquire if there were by radio?

A. No.

Q. When was it that you asked the Hercules to

(Testimony of James Ralph Reichel.)

come down? Was that after the Herald was anchored or before?

A. Well, we didn't directly ask the Hercules to come down ourselves; we never did get in contact with them until they were at sea.

Q. You were advised by your owners that she was en route? A. Yes.

Q. Do you know what companies operate sea-going tugs out of the Puget Sound area?

A. I know of two companies that operate sea-going tugs out of there.

Q. One is the Puget Sound Tug & Barge?

A. Puget Sound Tug & Barge, and the other one is——

Q. Foss? A. Foss.

Q. And Foss has quite a fleet of tugs?

A. Foss has the same type tug, too.

Q. They have big sea-going tugs?

A. Same thing, I think.

Q. Do you know whether or not they were requested to come and [90] assist you?

A. I do not know, sir.

Q. By the way, you are one of the libelants in this case, aren't you? You're seeking recovery for your own services in this case?

A. I don't know.

Mr. Morse: Mr. McKeon, he is a libelant?

Mr. McKeon: He is a libelant, yes. The libel is on behalf of the operators, owners and officers and the crew of each of the tugs.

The Witness: Oh.

(Testimony of James Ralph Reichel.)

Q. (By Mr. Morse): Does your log indicate your position with reference to North Head? I think it is at the entrance of the Columbia River, when your towing wire broke on the early morning of the 16th.

Mr. McKeon: The position?

Mr. Morse: Present position——

Mr. McKeon: Early in the morning of the 16th?

The Witness: Early morning of the 16th, no, we have no position down there.

Q. What was your last noted position?

A. Last noted position before that—well, noon position the day before is down.

Q. And where were you at that time?

A. Well, we estimated 45-57 north, 124-25 [91] west.

Q. And approximately with reference to the entrance of the Columbia River, would you be, off the west or south and west or south?

A. South and west.

Q. About how many miles, 25 miles?

A. I would have to look on the chart. I don't recall.

Q. We can compute that.

Mr. McKeon: What is it directly, 25, 30 miles?

The Witness: No, I believe it is further than that. I would say it must be about 50 or 60 miles. That was when the Balsam came out. Is that when you are talking about? I wanted to make sure.

Q. (By Mr. Morse): Were you able to approxi-

(Testimony of James Ralph Reichel.)

mate the speed that the Herald of the Morning was drifting when she was free?

A. No, sir, I was not.

Q. But her drift, as I recall, was northerly and in toward the coast? A. Yes, sir.

Q. Were you able, can you characterize the angle of approach?

A. Well, no, sir, but I do have the position down here, where the Neptune was struck, and also the position where the ship was finally anchored. By that I could lay out the course.

Q. All right, will you give us the position where the vessels were when the Neptune was struck?

A. As this position I have for the Neptune was an estimated [92] position, was 46-20 north, 125-20 west.

Q. Was that on bearing? A. No, sir.

Q. Just an estimate?

A. That was my estimated position.

Q. And what was the position when the Herald was at anchor?

A. Position there, 46-42 north, 124-26 west?

Q. How far offshore was that, approximately?

A. I don't recall. You could see lights on the beach.

Q. Ten miles?

A. No, I think it was less than that.

Q. Five miles, say?

A. I hate to say a figure, I don't know for sure. I can say——

(Testimony of James Ralph Reichel.)

Q. I don't want you to estimate because——

A. I could lay it on a chart and tell you in a few minutes.

Q. It is available from other information on the depth of the water, and so forth. Well, after the Herald had broken adrift from you on the morning of the 16th while it was still dark, did you come up to speak to the Herald?

A. I think that was the next day, wasn't it?

Q. Bearing in mind she broke adrift just a few minutes after midnight of the 16th.

A. That is right. Yes, well, after we stood by the Neptune we proceeded to——

Q. While it was still dark, before the Neptune was damaged, [93] while it was still dark, did you come up to the Herald and speak to her?

A. No.

Q. You didn't attempt to pass the line to her at all during the night?

A. Not at that time, no.

Q. During the day of the 16th, did you attempt to pass a line to her?

A. The day being 24 hours, we did that evening.

Q. The evening of the 16th? A. Yes.

Q. This was after the sinking of the Neptune?

A. Yes, we attempted to shoot a line aboard her that evening.

Q. Well, as I recall, you said that the wind was such that your shot missed the Herald of the Morning?

(Testimony of James Ralph Reichel.)

A. Well, the shot went off in the dark and we thought it had hit the ship, but they didn't seem to find it, so I guess it didn't.

Q. In any event——

A. In any event, we didn't make contact.

Q. And what line would you have passed to the *Herald*?

A. We would have passed our short piece of wire just as an added preventive.

Q. Yes. Were you on the weather side or the lee side of the *Herald* when you fired your [94] shot?

A. She was laying pretty near up into the wind during that time, laying at her anchor, so we were on her starboard side, so there wasn't anything much of a lee either side.

Q. This time, then, when you say you attempted to shoot a line over was after the *Herald* was at anchor?

A. That is correct, sir.

Q. As I understood you, she was headed into the wind?

A. More or less.

Q. She would ride normally, the tendency would be for her to, for her bow to head into the wind?

A. A ship at anchor like that, she would, of course, swing around a good deal, but her overall tendencies would be to head into the wind.

Q. Did you see the *Neptune* when she came up to the *Herald* while it was still dark? I think it was the——

Mr. McKeon: Night of the 15th.

(Testimony of James Ralph Reichel.)

Q. (By Mr. Morse): Night of the—So I won't guess, I will look it up.

The Court: Remember when that was?

The Witness: Yes, it was the night of the 15th.

The Court: What time?

The Witness: She came up there—it was approximately 9:00, 10:00 o'clock at night.

Q. (By Mr. Morse): She arrived about 10:00 o'clock p.m. on November 15? [95] A. Yes.

Q. While it was still dark, did she attempt to put a line to the Herald?

A. Well, we could see her working down there, had real bright work lights on her afterdeck and we could see her working.

Q. How far distant were you from the scene?

A. Well, the length of our hawser.

Mr. McKeon: At that time he had a hawser to the vessel.

Mr. Morse: Oh, yes, of course, of course.

Q. Was she on the weather side or the lee side at that time?

A. I believe he came up on the lee side.

Q. In any event, he was unsuccessful in getting a line to the Herald? A. Yes.

Q. On the night of the 15th was this just one of the occasions two occasions, while it was still dark?

A. He came up to the ship and drifted clear, or have to work himself clear, and come back again.

Q. Well, on the morning of the 16th, after you had broken free, the Neptune again came up to the

(Testimony of James Ralph Reichel.)

Herald and in the process of getting a line aboard was when she was in the collision? A. Yes.

Q. And as I recall, you said you were on the port quarter? A. That is right, sir.

Q. Now, for the Court's instruction, I think the port quarter [96] would be the lefthand side and looking off abaft the beam would be amidships, the port quarter would be halfway amidships toward the stern of the vessel? Is that right?

A. That is correct, sir.

Q. In other words, three-quarters of the way from the bow toward the stern. About how far distant were you at that time?

A. Well, we were different distances; we would work up and fall back, I would say, go as much as a half a mile away up to, oh, a quarter of a mile.

Q. And the time elapsed while the Neptune was up at the bow, was somewhat in the neighborhood of an hour?

A. I would say it was approximately, sir. We didn't keep a record of what they were doing, but it seemed about an hour.

Q. Was the Neptune staying on the weather side of the bow most of the time?

A. Yes, he was working up to the ship, as the ship was drifting down, he was working in on this angle, the ship laying over, so he worked into it this way (indicating).

Q. He was working from it—put it this way: The ship was lying broadside to the wind, was she?

(Testimony of James Ralph Reichel.)

A. Yes, sir.

Q. And which direction?

Mr. McKeon: She wasn't lying, she was drifting, drifting as distinguished from lying. [97]

Mr. Morse: I didn't suggest that she was lying dead.

The Court: You describe the conditions at that time.

The Witness: She was drifting along with the wind, but laying there drifting along and this other boat came up and would follow along with the ship.

The Court: What boat is that?

The Witness: That is the Neptune, attempted to pass the wire.

Q. (By Mr. Morse): Could you see whether she was forward of the bow of the Herald?

A. We couldn't actually tell where she was, ahead of the bow or not, but right around the bow of the vessel.

Q. And were you on the weather side during this time that you were observing?

A. We were.

Q. So that the Neptune also must have been on the weather side most of the time, otherwise you wouldn't have seen her?

A. Yes.

The Court: Take a recess.

(Short recess.)

Q. (By Mr. Morse): Was it your practice, as

(Testimony of James Ralph Reichel.)

you were proceeding up the coast, to fix your position on shore points? A. Yes.

Q. Did you make notations in your logs of these fixes? A. Yes, in passing abeam. [98]

Q. Commencing on the 14th, can you tell us which, if any, of the positions were fixed on shore points?

A. Well, looking back upon it now, I don't recall. I think that many of them were noon positions put down. We take the latest noon position and estimate our position where we were at noon.

Q. All right. Your noon positions, those were sightings on the sun, were they?

A. Oh, at times we took sights, but not very often.

Q. And how did you fix your noon position?

A. Well, we usually, say we got a point abeam on the morning, and estimate, make a notation and mark it on the chart, dead reckoning for your position.

Q. Can you—all right, then. Were you able to see shore points at any time on the 14th?

A. 14th?

Q. That was the day that you had trouble, first had trouble with your winch.

A. Yes, as I recall, we saw Tillamook Light at that time.

Q. So that was an accurate fix?

A. Yes. We do that by taking bearings; it is rather difficult to take a bearing on a towboat,

(Testimony of James Ralph Reichel.)

pitching that hard, so you might not come out exact.

Q. All I am endeavoring to establish here is whether these several positions that you were in that you had given us at the [99] time when the Neptune sank and the time when the—was it a fix on a shore position?

A. No, that was an estimate.

Q. That was an estimate?

A. That was an estimate. I estimated it during the day, perceiving which way you drift with the wind and weather, and tried to figure out approximately where we were from that.

Q. And the position when the Herald of the Morning was at anchor, that was an estimate, or fixed on shore structures?

A. I don't recall at the present time, but I do believe we took bearings of both points at that time.

Q. Now, I noticed at one point in a log you made a reference the wind was southeast 8. A southeast wind would tend to blow you offshore, wouldn't it?

A. Southeast? Yes, sir.

Q. And I assume that the wind was variable at times, blow east and southeast, and others blow from east or southwest?

A. Yes, the wind would vary considerably.

Q. Did you observe the Coast Guard Balsam when she put her ten inch line to the Herald of the Morning?

A. No, were nowheres in the vicinity at that time.

(Testimony of James Ralph Reichel.)

Q. At that time you were in the vicinity of the Neptune?

A. I believe we were standing by the Neptune. I don't know what time she tried that. We didn't leave the Neptune——

Mr. McKeon: Either there or on the way back to the [100] Herald.

Q. (By Mr. Morse): It was on November 16 at 1630 hours, which would be 4:30 p.m.

A. That would be 4:30 standard time, wouldn't it?

Q. No, this was daylight saving time.

A. Daylight saving time—well, the Neptune sank at 5:23 p.m. and we stood by the Neptune until that time.

Q. From the time the Neptune was holed until she sank, she had headed inshore as close as she could operate?

A. Well, she was maneuvering, first trying to get hold of that collision mat that the Coast Guard cutter was attempting to pass to her.

Q. Approximately how far from the point of collision did she navigate or maneuver until she sank, would you say?

A. Well, most of it was in a circular direction, going around and around.

Q. So that it was in the same approximate position? A. Approximately, yes.

Q. And from the time she sank until—from the time she was in collision until she sank, how many hours elapsed?

(Testimony of James Ralph Reichel.)

A. Let's see. The collision was, got it down at 10:15 a.m. Neptune was holed and she sank at 5:23 p.m., holed at 10:15.

Q. That is approximately seven hours.

A. About seven hours.

Q. In that period of time how far would the—as I understand [101] you to say, the Herald of the Morning was almost in your horizon at the time the Neptune was sunk, over the horizon?

A. She was outside by that time. While they were removing the crew of the Neptune, I happened to look up one time and I noticed that the Herald of the Morning was quite a great distance away.

Q. What would your horizon distance have been, or the distance to the horizon, have been, approximately?

A. Well, for an object that high, of course a ship being above the horizon, I would say you could see her for seven or eight miles.

Q. So she had, during the seven hour period, she drifted at least seven or eight miles?

A. Yes, because she was outside at the time.

Q. And was she drifting towards shore or parallel to the coast or could you tell?

A. Well, I didn't think at that time exactly which way she was drifting.

Q. Now, we get down to the time when the Herald was anchored on the—she dropped her anchor before midnight of the 16th, as I recall.

A. Yes.

(Testimony of James Ralph Reichel.)

Q. And she rode at anchor all day the 17th?

A. Yes.

Q. And during the day of the 17th the Coast Guard Winona passed [102] a twelve-inch line to the Herald of the Morning and subsequently transferred the bitter end to the Sea Fox?

A. Yes, sir.

Q. Now, when the Hercules came to the vicinity during that night, in other words, the——

A. Night of the 17th, 18th——

Q. The night of the 17th, 18th?

A. Yes.

Q. Do you know whether she attempted to pass a line to the Herald during—while it was still dark?

A. I don't know, seemed to be pretty close to her. I think she spoke to the ship, she was that close.

Q. But as far as you observed, she didn't attempt to pass a line?

A. She didn't have a line out when she came out from there.

Q. Now, coming now to the daylight hours of the 17th, the Hercules did pass a line?

A. Yes, she passed her wire up.

Q. How was the Herald of the Morning lying? Was she generally—was she lying with the bow into the wind most of the time?

A. Yes, she was more or less lying into the wind.

(Testimony of James Ralph Reichel.)

Q. She didn't lie, she didn't have a tendency to lie broadside to the wind?

A. No, because she was held at one end there.

Q. Now, when the Hercules was attempting to pass a line aboard, [103] how much—strike that. What position were you endeavoring to maintain in order to minimize the hazard to your twelve inch line and also minimize the hazard to the Hercules?

A. We were trying to lay as much clear as possible ahead and of course to one side, to leave him one side more clear than the other.

Mr. McKeon: What is that question?

(Question read.)

Q. (By Mr. Morse): I assume that the maximum degree of safety would have been for you to be off at 90 degrees from the line of the fore and aft line of the Hercules; that would be the maximum degree of safety in so far as the Hercules' position was concerned?

A. Yes, in some ways it might be and some ways it might not be. If he—there is really nowheres he can get entirely clear because of the fact the line is still there, but if we get off to one side the ship is anchored way over here, it does make more room for them to work around here (indicating).

Q. You were able to keep off to one side all the time?

A. Yes.

Q. And it is a fact that the Hercules did not come in contact with your line?

A. No, she didn't.

(Testimony of James Ralph Reichel.)

Q. And she didn't come in contact with the Herald of the Morning? [104]

A. I don't believe she did.

Q. Now, you mentioned that after the Hercules had gotten her line to the Herald——

A. Yes, sir.

Q. ——and had proceeded on out, I assume she had then pretty close to 1,000 feet of wire between herself and the Hercules?

A. Paid out some amount of wire; she had a line out.

Q. How much line did you have out?

A. We had a line passed up by the Winona and I think it was approximately 1,000 feet long.

Q. Then you would have had perhaps 900 to 1,000 feet of—— A. Yes.

Q. ——of Manila line. You mentioned before the anchor was released overboard you and the Hercules were in irons? A. Yes, sir.

Q. Did you, in fact, ever come in collision?

A. No, we never did.

Q. And didn't come in collision at any time?

A. No, sir, we never did touch.

Q. Can you compute the relative strength——strike that. Do you know the relative strength of a wire cable? A. Yes.

Q. ——compared with the comparable size Manila line?

A. I would have to look that up in the seaman-ship book, sir; those are figures that I don't tow around in my head. [105]

(Testimony of James Ralph Reichel.)

Q. If you don't know—I am not trying to trip you up, I have looked it up, and I think, if I understand it, a Manila line has about one-sixth of the strength that a wire has, each having the same diameter. Does that sound approximately right to you?

A. If you looked it up, it does sound right, yes, sir.

Q. After all, the books are more accurate than I am.

A. Yes.

Q. So I am not trying to pin you down. It wasn't nearly as dangerous for the Hercules to attempt to get a line aboard as it had been for the Neptune, was it?

A. Oh, no, because the weather had moderated at that time.

Q. Moderated, and the Herald of the Morning was anchored?

A. Well, being anchored wouldn't assist them, I don't think, in putting up a wire.

Q. Well, didn't it make it less hazardous to maneuver because the Herald of the Morning wouldn't have been shifting around as much?

A. No, but she was, be still pitching at her anchor, still is a dangerous job.

Q. In any of your towing jobs, have you ever used a towing wire of a diameter in excess of $1\frac{3}{4}$ inches?

A. Yes, I have.

Q. Towing cargo vessels of this comparable size?

A. Not when towing vessels of this kind. It was

(Testimony of James Ralph Reichel.)

oil barges, [106] with a different type of boat than this.

Q. What size towing wires have you used?

A. Two inches has been the maximum we have used.

Q. Did you actually take any water inside the Sea Fox? In other words, were your bilge soundings increased while you were, at any time subsequent to November the 14th?

A. After the 14th, sir?

Q. Commencing with the 14th.

A. Well, yes, we took water into the boat, the rooms were—had water in them. The weather and seas would break aboard and come inside of us.

Q. Would that amount to any substantial quantity of water?

A. You mean to fill up the boat?

Q. Was it hazardous to the vessel?

A. By the amount of water?

Q. Yes. A. No.

Q. What free board do you have, by the way?

A. From the pencil mark to the deckline, I should say about two feet.

Q. So that the stern end of your tug is just about so far above the level of the water, isn't it?

A. Yes, about four or five feet.

Q. Well, all right, four or five feet, and it wouldn't take a tremendous sea to have green water on your stern? [107]

A. It will with the tow, sir, because towboats

(Testimony of James Ralph Reichel.)

are so built, the design of the vessel is such that they rise with the seas. If you had a ship that only had the same amount of freeboard that——

Q. It will tend to act like a cork?

A. Yes, sir.

Q. When the stern is held down by the heavy weight of the line to your tow, the stern isn't able to move up and down as readily, is it?

A. Well, maybe not as readily, but it will rise right up.

Q. Have you ever been in your tug at sea when you have taken green water aboard other than this occasion?

A. At times, yes, sir.

Q. It isn't an extraordinary situation, is it?

A. No, but it is—it isn't a situation we like too much.

Q. Yes, I appreciate that. Would you say that the Balsam and the Winona could have handled the situation without the assistance of the Hercules?

A. Well, you mean, could they have towed the vessel?

Q. Yes.

A. I assume they could tow; I assume they could, yes.

Q. They are big powerful vessels, equipped with——

A. Well, I don't know.

Q. ——towing winches?

A. I don't know if they have towing machines or not, never been [108] aboard, but I assume, the Coast Guard does rescue work, they must have been set up to do it.

(Testimony of James Ralph Reichel.)

Mr. McKeon: You don't know?

The Witness: I have never been aboard. I don't know if they have any towing machines.

Q. Do they have to have a towing machine, or couldn't bitts be used?

A. Well, bitts can be used in an emergency if nothing else is available; they can use bitts, but they are not nearly as good to tow on as a towing machine.

Q. Talking about a towing machine, actually the only purpose of your winch was for the purpose of letting out line, as you indicated?

A. Well, letting out and heaving in.

Q. Other than the times you wanted to do so, probably, and having to do so by manually operated controls, your winch was stationary?

A. That is correct.

Q. Yours wasn't a type of winch which automatically let in and let out as the strain increased or decreased?

A. No, it was not.

Q. Have you been on sea-going tugs having such an automatic winch?

A. Yes, I have.

Mr. Morse: No further questions. [109]

Redirect Examination

By Mr. McKeon:

Q. Captain, I have just a few questions.

The Court: What?

Mr. McKeon: Just a few questions.

The Court: Make it a few. Proceed.

(Testimony of James Ralph Reichel.)

Q. (By Mr. McKeon): When you talk about the steel hawser being 1,200 feet, do you know actually whether it is 1,200 or more?

A. No, I have never measured one. I just think it is approximately 1,200 feet long.

Q. You have been up and down this coast as an officer of ships on tugboats many times?

A. Yes, I have.

Q. In all seasons? A. Yes, I have.

Q. Did you ever experience any worse weather and seas than you did on this particular voyage, the 15th and 16th?

A. No, this is the roughest I have seen on this coast. It is very clear in my memory for that reason, so——

Mr. McKeon: That is all.

The Court: Step down.

Mr. Morse: May I ask just one more?

Recross-Examination

By Mr. Morse:

Q. Speaking of the weather, you did overhear—put it the other way around—normally you do listen in to [110] weather broadcasts, don't you?

A. Yes, we do.

Q. When you are at sea? A. Yes.

Q. And you did hear the weather broadcast when proceeding up the coast?

A. Yes, we did.

Q. And do you recall now whether the broadcasts advised of the approach of this storm?

(Testimony of James Ralph Reichel.)

A. Well, yes, but we knew there was storms like—you mean this last storm, the big storm we had?

Q. The storm commencing—well, commencing the 13th of November.

A. Yes, we were advised it was coming.

Q. Did you communicate with the owners at that time when you were advised by the weather broadcast that the storm was imminent?

A. Well, we used to report our position every day by radio.

Q. Did you receive any instructions from your owners in respect to the imminency of this storm?

A. No, we handled those things on the boat ourselves.

Mr. Morse: No further questions.

Mr. McKeon: That is all.

The Court: Call your next witness.

Mr. McKeon: Captain Sprague.

This witness is from Seattle, your Honor, and I would like [111] to have him depart.

Mr. Morse: He may be excused, so far as I am concerned.

The Court: He may be excused.

KELLY SPRAGUE

called as a witness on behalf of the libelant; sworn.

The Clerk: Your full name, please.

A. Kelly Sprague.

The Court: What is your business or occupation? A. Tugboat captain.

The Court: How long have you been so engaged?

A. I have been nearly fifteen years.

Q. And were you on one of those tugboats at the time in question here?

A. Captain of the Neptune, sir.

Q. Of what? A. Of the Neptune.

Q. How long were you on that boat?

A. Approximately three months.

The Court: Proceed.

Direct Examination

By Mr. McKeon:

Q. During your fifteen years' towboat experience, Captain, have you frequently been on ocean towing? A. Yes, sir.

Q. And were you the master of the tug Neptune at the time of [112] her loss? A. Yes.

Q. Captain, I show you an amendment to the libel which sets forth the names of the personnel on the Neptune. Will you read that and tell us whether those are the men who were on the Neptune at the time of this service?

A. Those were the men.

Q. Yes. Now, to expedite this as much as we can, Captain, you got a message by radiotelephone

(Testimony of Kelly Sprague.)

from the Sea Fox telling you about some condition in which she was in, or telling you something about needing assistance? A. Yes, sir.

Q. And then that was on the 14th, was it not?

A. That's right.

Q. And then did you put out for the position that you understood the Sea Fox and the Herald were in?

A. Yes, we headed directly to that scene.

Q. That was, about what time did you start out, as you remember?

A. It was around 4:30 in the afternoon of the 14th.

Q. And what time did you get to the vicinity of the two vessels?

A. 9:00 p.m., the following evening.

Q. Describe the weather that you experienced en route?

A. We had a strong southeast wind, and heavy rolling sea.

Q. After your arrival, did you have an opportunity to size up [113] the situation?

A. Yes, sir, we proceeded slow around the Sea Fox and the Herald of the Morning.

Q. Did the Sea Fox have a hawser to the Herald of the Morning? A. He did.

Q. Well, now, if you will just tell the Court, Captain, in your own words, what you did from the time you arrived until the time that you and the Herald of the Morning came together and you received your mortal wound?

(Testimony of Kelly Sprague.)

A. Well, we were in continuous contact with the Sea Fox and also the Balsam by radiotelephone and the Sea Fox explained the situation that his tow——

Q. I want you to tell the Court what you did, not what somebody else told you.

A. That is what I was coming to. He was in danger of losing his hold of the tow because of the trouble he was having with his towing machine. So I decided that I would try to get a line aboard as soon as possible while he still had ahold of it so that the Herald wouldn't be adrift helpless.

So I had all the crew up on the Neptune and instructed the mate what gear we wanted to use and all the men turned to getting that gear ready, took them about an hour. The gear was all lashed, of course, and took them an hour to get that ready.

During this time, a very heavy sea was running and a strong wind, and the men were quite imperilled on the tug because [114] of the green seas breaking over the vessel and the decks and boards or rail were completely filled with water.

Mr. Morse: May I interrupt, Captain? Was this during daylight of the 16th?

The Witness: No, this was the night we arrived there.

Mr. Morse: I see.

The Court: That would be the night of what?

The Witness: The night of the 15th.

The Court: The 15th. All right.

(Testimony of Kelly Sprague.)

A. (Continuing): Well, we finally managed to get this gear ready and proceeded to the lee side of the *Herald of the Morning* and maneuvered the *Neptune*, stern of the *Neptune* close to the bow of the *Herald of the Morning* and the crew of the *Herald of the Morning* managed to get a small line down to us, a heaving line, and the crew were bending over this line tying it to the wire I intended to pass up to them, and had quite a difficulty in this heavy sea. The *Herald of the Morning* was yawing, and us, too, both going up and down. It was quite difficult to try to keep the tug close enough so they could heave this wire up by manpower, and managed to get fairly close, or close enough where I thought they could get it up, and these heavy seas were still breaking over the vessel and——

I was standing on the after controls. The tug has an after control on the boat deck and these seas were breaking over me, too, up there, and the men down below were practically on their [115] hands and knees hanging on trying to get this line up and she filled up so one time there so completely that the water shorted out some electrical wiring and all the lines—electric light on the tug went out. So all I could do was to maneuver the tug away from the *Herald of the Morning* and in a short while the engineer had the lights back on again, but I decided, because of the weather and the danger involved, to not take another chance that night, so——

(Testimony of Kelly Sprague.)

Q. Were there any lines floated to you that night, or an attempt to be floated?

A. No, we were on the lee side and they threw the cable line down to us.

Q. The floating didn't take place that night?

A. No, sir.

Q. You knocked off that attempt; then what did you do?

A. I just cruised around it slow, circled the Sea Fox and the Herald of the Morning, intending to do so until daylight, and about 1:00 o'clock in the morning the Sea Fox radioed to me that his towing line had parted and——

The Court: What time about was this?

The Witness: It was around 1:00 o'clock in the morning of the 16th.

The Court: 16th, all right. What occurred then?

The Witness: Well, the ship swung broadside to the wind and proceeded to drift, so all the remainder of the night I just [116] kept on with the Herald of the Morning trying to keep it in sight, waiting for daylight to try to make another pickup there. About 7:00 o'clock, why, again——

The Court: That would be on what date?

The Witness: The morning of the 16th.

The Court: All right.

The Witness (Continuing): We—the crew turned to getting the lines ready again to make another attempt and I proceeded up close enough to the Herald of the Morning to talk to the captain. I

(Testimony of Kelly Sprague.)

asked the captain of the Herald of the Morning if it was possible to, if he had any anchor chain that he could get down to us. We had power in the tug and I believed if he could pass a line down to us it would be the safest and easiest.

Q. (By Mr. McKeon): You knew that he didn't have power for his ship?

A. Yes, he was dead, and he informed me that he had nothing that he could send down to us. He had one anchor there, hanging there, and I thought possibly he could lower that anchor to the first connecting shackle and break that drift and pass up by means of a line at the end of this chain to us, so we could shackle our towline onto him and have a good hold of him. But he informed me, so far as the chain was concerned, he was all done. He had lost so much previously he had none left. So the only thing we could do was to get a wire from [117] us up to him.

So I maneuvered the Neptune to the downwind, or would be the lee side of the Herald of the Morning, and attempted to throw heaving lines. This was unsuccessful and I wasn't able to keep the Neptune close enough to the Herald of the Morning to get a line across. I couldn't take the chance of getting too close to the Herald of the Morning from this approach, because if the Herald of the Morning was brought—that is the effect of a ship in a strong wind—a vessel will go broadside, if my vessel was on the lee side, and I just didn't happen to judge it correctly, had to slow down enough to

(Testimony of Kelly Sprague.)

try to get close to the Herald of the Morning to get a line across, if I happened to approach like he was, I wouldn't have a chance of getting away from the lee side of the Herald of the Morning and he would be on top of us and——

Q. In other words, he would have drifted toward you? A. Yes.

Q. Drifted down on you?

A. This vessel is way out of the water and she is just a small tug, comparatively, and he would drift faster than we would and he would be down right on top of us and if that happened, why, we would all have lost our lives. So I proceeded around to the windward side of the Herald of the Morning and the crew of the Herald of the Morning fastened a small line by means of two liferings. [118]

Q. Two what?

A. Two liferings, cork liferings.

Q. Two life cork rings?

A. Yes, and they put this out through the bow and as the ship was drifting about three miles an hour. And they let that out far enough so that we could pick that up and still be clear of the ship and after two attempts to pick up these liferings, we did, and the crew bent this on to our pennant, an inch and a half wire pennant.

Q. That is, your crew did?

A. Yes, to send up to the ship. This they were able to do in spite of the going back and forth of the vessels and the difference of the rising and falling, and I hollered to the captain of the ship to

(Testimony of Kelly Sprague.)

have his men heave this line up, which they did. They managed to get it, the end of our wire up to the bow chock, or opening in the bow of the ship, but they were unable to get this end of the wire which had a thimble in it over the lip of the chock, and they struggled with the hawser for probably about an hour, I would say.

Q. This was the wire pennant you were speaking of? A. Attached to our heavy towing line.

Q. What was your towing line, $1\frac{3}{4}$?

A. Yes, sir.

Q. Steel?

A. Steel cable, and in this heavy sea the tug and the ship [119] were consequently short distances apart and it was necessary for us to pay out on this heavy towline, so they would have enough slack to get it up to the ship, and when I saw the difficulty they were having trying to get it through this chock, I attempted to keep the tug Neptune as close as I could to the ship so we could heave in as much of this heavy towline of ours to take as much weight off as possible to get this wire through the chock.

Q. In other words, the closer you got to the vessel, the less weight?

A. The less weight the men would have to pull this wire through.

The Court: Describe this chock.

The Witness: Now, it was just an opening, an eye.

The Court: An eye opening?

(Testimony of Kelly Sprague.)

The Witness: Yes, where the line ran through.

Q. (By Mr. McKeon): Up on top of the vessel?

A. It had a lip underneath it and the wire, the heavy wire hanging down, they were unable to get the heavy wire through this opening.

The Court: Go on.

The Witness: The ship is drifting and I kept kicking the tug slow ahead, kept it as close as I could to the bow of the Herald of the Morning while they attempted to pull this line through. [120]

Q. Would you use these models to help the Court and just describe your easing in and the way the ship was and the way your tug was?

A. This is the Herald of the Morning, the ship, and this is the tug Neptune, and I am laying up here, the ship is drifting that way (indicating).

Mr. Morse: You have them bow to bow, Captain.

The Witness: Yes, sir. And this line from here to here——

The Court: The shore would be here?

The Witness: The shore is in here, sir. This vessel drifted in toward the shore.

Mr. Morse: The shore is 15 to 20 miles distant.

The Court: Yes, I just wanted to get it located.

The Witness: Drifted in here about three miles and we were attempting to get this line from the stern of this tug up to here, and I am kicking this tug along with the ship trying to get as close as I can by taking the weight of this heavier wire, as much weight off so they can get it up in there.

(Testimony of Kelly Sprague.)

Q. (By Mr. McKeon): How long were you doing that, about, Captain?

A. I would say about an hour.

Q. About an hour.

A. Well, I was about 75 feet off——

The Court: 35?

The Witness: About 75 feet. [121]

The Court: 75.

The Witness: And a huge, unusually large sea picked us up bodily and threw us right into the bow of this ship. When I saw that the sea picked us up, I came full astern on our engines, trying to back her clear, but the sea was so large that my going full astern had no effect on the tug and we were just carried bodily right into the bow of the ship, and this particular time his bow was completely out of the water and this sharp edge of the bottom of the ship came down on us and cut a hole in us.

The Court: Where? •

The Witness: Right about here (indicating).

The Court: I see.

Q. (By Mr. McKeon): Have the effect of a knife chiseling right through?

A. Yes, sir. When it did, she bounced clear, they let this line go and she proceeded off here (indicating). I turned the controls, the wheel over to the mate, and I went down below with the first engineer to see what the damage was. We found a hole in the side about five feet. Water was rushing in and it punctured the fuel tank, too.

The Court: A fuel tank?

(Testimony of Kelly Sprague.)

The Witness: Yes, sir.

The Court: What happened?

The Witness: And oil was running out and there was nothing [122] that we could do in this compartment, so the chief and I got out of there and shut the watertight door and I told him to do the best he could with all the pumps he had, to try to keep her afloat and went back on deck again and ordered the crew to put on life preservers and close all the watertight compartments in the vessel, probably if she filled up with water she may stay afloat and this was done and I contacted the Coast Guard cutter Balsam, it was standing by, and explained what happened, and I asked him if he had a collision mat aboard.

The Court: A what?

The Witness: A collision mat.

The Court: What is that?

The Witness: It is made out of canvas and manila, something to get in over this hole. The pressure of the water, the sea will hold it there and like a temporary patch.

The Court: What happened?

The Witness: He said that he did and so an attempt was made to pass this collision mat from him to me. It is a very heavy mat. They took—it took them quite a while to get it over the side of the Coast Guard vessel—were right ahead of us and ran, took it to the right quarter and then ran it back on a line. I came back alongside of the hole, the crew turned to trying to get ahold of this mat and get it on deck, but due to the heavy sea and

(Testimony of Kelly Sprague.)

the heavy collision mat we were unable to move it and in the meantime the water got the best of [123] the engineer and he couldn't hold it with the pump and she proceeded to fill up and listed over to the second deck, the boat deck down in the water, and there is an escape hatch from the engine room up on this boat deck and when the water got up to this patch, I hollered down to the engineer to come out of there, nothing more they could do, and the tug Sea Fox was standing right close to us all this time and I called over to them through the megaphone to contact the Coast Guard by radio because mine had shorted out, to come over to pick us out and take us off. So he did that and the Coast Guard boat came over near us and they got a small line across to us and by that means sent a heavier line and a small rubber liferaft and they got that over to us and we started to—ordered the crew two at a time to be transferred from us to the Coast Guard boat.

The first two men got in, one of them, when he jumped into the liferaft, was bouncing, he had to jump into it—he is an elderly man and he bounced out and went into the water and he had a heart attack and died. The rest of us managed, two at a time, to transfer across to the Coast Guard vessel. They had nets hung over the side of the Coast Guard boat and as he pulled us over to him, we, the men, grabbed these nets and climbed up it. The Coast Guard men also climbed down and helped the men up the nets.

(Testimony of Kelly Sprague.)

The Court: It is 12:00 o'clock. You said something, that [124] you were going to some luncheon today that you were the speaker of the day and wanted a little time. Did you take that up with counsel?

Mr. Morse: Perfectly agreeable.

The Court: A quarter after 2:00 then?

Mr. McKeon: Yes, sir.

The Court: Very well.

(Thereupon an adjournment was taken to 2:15 p.m.) [125]

Afternoon Session, Thursday, January 18, 1951

KELLY SPRAGUE

resumed the stand on behalf of the libelants.

Direct Examination

(Continued)

Mr. McKeon: If the Court please, Mr. Morse and I have been discussing some method of trying to shorten the examination and I have witnesses here from out of town, more or less cumulative, and he is not going to call all of his people, so with that in mind we will dispose of some of the witnesses, if the Court please.

The Court: Very well.

Mr. McKeon: Unless Your Honor feels you want more. For example, the mate of this ship, the Neptune here, it would be substantially cumulative. I have got two officers of the Hercules and

(Testimony of Kelly Sprague.)

that will be cumulative—not the Hercules, but the Sea Fox—cumulative.

Mr. Morse: You are going to have the master of the Sea Fox?

Mr. McKeon: Yes.

Q. Captain, from the time you arrived on the scene on the night of the 15th until your tug received her mortal wound, were you exercising your best judgment and efforts to save that vessel and her men? A. Yes.

Q. Again directing your attention to the night of the 15th and [126] the 16th, will you tell the Court in your own language what that weather was and the seas?

A. Well, I would say the wind was blowing between 60 and 70 miles an hour. There was a very huge sea running, heavy swell, mountainous seas, and the wind was breaking the tops of the—blowing the tops of the seas right off.

Q. And on your tug were you shipping green seas?

A. Yes, sir. I was on the boat deck handling controls, we were shipping green seas right over the boat deck. I had to hang on to handle the controls.

Q. Now, during that night the men, yourself and the men on your tug kept going all night?

A. After I decided not to make another attempt that night, I told the majority of the men to try to get a little rest. The tug was rolling so heavily

(Testimony of Kelly Sprague.)

and pitching it was impossible to do anything. I stayed all night on the wheel.

Q. You didn't get any rest, Captain?

A. No, sir.

Q. Did those conditions which you have described continue and prevail when the hawser of the Sea Fox parted?

A. Yes, sir, that was——

Q. It was going that way then, too?

A. Yes, sir.

Q. Now, did those conditions that you have described make the task of your vessel and her men more hazardous? [127]

A. Very much so.

Mr. McKeon: Will you read the question?

Mr. Morse: He said very much so.

Mr. McKeon: I beg your pardon. I didn't hear him.

Q. How many times, or approximately how many times do you remember they did try to float lines to you from the Herald?

A. Just that morning, that one time they put this line out on the buoy and let it go.

Q. Is that the method through which you actually got your line out to the Herald?

A. Yes, sir.

Q. In other words, that buoy was floated to you and then you made a line fast that was pulled back to the Herald and the Herald then started to haul that line in?

A. Yes, sir.

Q. Attached to that line was the pennant connected with your steel hawser?

A. Yes, sir.

(Testimony of Kelly Sprague.)

Q. And they were hauling in the line and they got the line and your hawser up to the chock?

A. Yes, sir.

Q. And they were actually working aboard the Herald trying to get that hawser to make it fast?

A. Yes, sir, they had the wire up to the chock, up to the bow of the ship. [128]

Q. And they didn't succeed in getting that aboard or made fast on the Herald?

A. No, sir.

Q. They, of course, had no power on that vessel? It was all hand power they were working with?

A. Yes, sir.

Q. In other words, the men on the Herald had to do that work physically, with their own hands?

A. That is right.

Q. And I think you said they were working there approximately an hour?

A. I believe an hour, yes, sir.

Q. And that was the situation that they had the line up to the chock when this sea hit you, raised her and you came together?

A. Yes, sir.

Q. Now, Captain, during that interval of easing your way into the Herald with that line, what was your object? Why did you have to do that?

A. Well, the ship was adrift, it was helpless with the 16 men aboard, there was an offshore breeze blowing from the shore, and it was imperative that someone get hold of the ship to save that ship going ashore.

Q. Now, would the men on the Herald, being

(Testimony of Kelly Sprague.)

without power, they had no auxiliary power of any kind, as I understand it, they [129] had to haul that cable of yours in up to their chock and try to get it over the chock? A. Yes, sir.

Q. The closer you got to the vessel the less weight they would have to haul?

A. The closer I could get, the more I could heave and be less weight in the water.

Q. You were attempting to do that?

A. Yes, sir.

Q. Having that in mind?

A. Yes, sir, that was what was taking place.

Q. And during that interval of time were you proceeding as cautiously as you thought you could proceed and still do your job? A. Yes, sir.

Q. Now, after the attempt to get a collision mat aboard and secured on your vessel, your tug, I suppose, took a list? A. Yes, sir.

Q. And she continued listing until she filled and went down? A. Yes, sir.

Q. Now, beginning shortly after you were holed, did you have a hope that you could save your vessel?

A. Yes, I did, sir, with the collision mat.

Q. And all efforts were made to save your tug?

A. Yes, sir. [130]

Q. And it wasn't until some time later that you gave it up as a hopeless task? A. Yes, sir.

Q. Just about that time or shortly after that collision, a naval tender came along there, did it not? A. Yes, it did.

(Testimony of Kelly Sprague.)

Q. That was a big naval tender?

A. A large ship.

Q. And she asked if she could be of any help?

A. She communicated with the Coast Guard vessel.

Q. Was that passed on to you or do you know?

A. No, sir, it was not.

Q. Have you any judgment, Captain, as to where you were with respect to distance offshore at the time of the collision?

A. I would say about twenty miles offshore.

Q. About twenty miles. In this attempt that was made and successfully made, rescuing your crew, officers and yourself from the Neptune, the Coast Guard Balsam got the rubber liferaft or lifeboat to you? A. Yes, sir.

Q. What was that, a liferaft?

A. A small rubber liferaft.

Q. Liferaft. Were conditions such that they could lower a boat?

A. No, it would have been very dangerous to attempt to lower a boat. [131]

Q. The weather was too bad for that?

A. Yes, sir.

Q. After the hawser parted and the Herald went off drifting in the night, could you observe her drifting? This was before your collision, of course.

A. Yes, sir, we had.

Q. And you kept after her?

A. We kept running slow to keep her in sight.

(Testimony of Kelly Sprague.)

Q. And the Hercules was following along with you? A. The Sea Fox.

Q. I mean the Sea Fox. A. Yes, sir.

Q. Do you know approximately how far she drifted?

A. Well, we were about thirty miles offshore when we came up the previous evening.

Q. She was drifting out to sea, then, or in toward shore? A. Toward shore.

Q. Toward shore? A. Yes, sir.

Q. How far would you say she had drifted in-shore? A. I would say ten miles.

Q. After you got aboard, or were removed from your vessel, you got your officers and your crew got on the Balsam, stayed on the Balsam?

A. Yes, sir. [132]

Q. Did the Balsam, after your vessel sank, put out after the Herald? A. Yes, he did.

Q. And were you, or did you observe the Balsam later that night trying to get, or succeed in getting a manila hawser aboard the Herald?

A. Yes, I did. She got a manila hawser aboard.

Q. What happened to it?

A. After he got it aboard, he came ahead slow to pick up the strain and shortly after he got the strain on the line running slow, the short wire pennant on the manila hawser parted.

Q. Carried away? A. Carried away.

Q. Did you observe the position of the Balsam tug trying to pass that manila line?

A. Yes, sir, I did, sir.

(Testimony of Kelly Sprague.)

Q. Did the commanding officer of the Balsam ask you for your judgment how to do that?

A. He asked me how, what procedure I took, and he made the same approach on the vessel.

Q. He used the same approach at that time that you had previously taken? A. Yes, sir.

Q. Have you had experience in ocean towing on the Pacific? A. Yes, sir. [133]

Q. Over many years, have you not, Captain?

A. Yes, sir.

Q. To all points of the Pacific?

A. Yes, sir.

Q. And a good bit of it in the northern waters?

A. Yes, sir.

Q. Including Alaska? A. Yes, sir.

Q. Have you had any experience of having a tow shearing from side to side?

A. When the wind is blowing strong, yes, sir.

Q. And I suppose the lighter a ship is, the greater the target for the wind? A. Yes, sir.

Q. And this Herald of the Morning was a light ship? A. Yes, sir.

Q. So to speak, it stuck up high out of the water? A. Yes, sir.

Q. And it was a fine target for the wind?

A. Yes, sir.

Q. If such a tow in the wind shoots off the starboard and shoots off the port and runs up ahead of the tug or alongside the tug, in those conditions is there anything a tug can do about it?

A. Absolutely nothing. [134]

(Testimony of Kelly Sprague.)

Q. Have you had that experience?

A. Yes, sir, I have.

Q. Have you been on sister tugs to the Sea Fox?

A. Yes, on the same type of boat.

Q. Captain, if you, bearing in mind your knowledge of the weather that you actually experienced there and had the Herald of the Morning in tow itself, as the Sea Fox did, would you have attempted to bring that tow in over the Columbia River bar?

A. No, I would not.

Q. Why not?

A. Well, the weather like that, a storm like that, the bar would be impassable for a tow of that sort.

Q. First, you got a tow stuck out quite a distance astern? A. Yes, sir.

Q. And you haven't any means of controlling her? A. No.

Q. And it is quite a different thing from a ship going in to the Columbia River under her own power and taking a tow? A. Yes, sir.

Q. You wouldn't bring her in San Francisco Harbor under those conditions?

A. Not in that storm; lay outside until the weather went down.

Q. Or any other harbor?

A. No, sir. [135]

Q. During many years up and down this coast, have you run on to any weather more severe than what you experienced on that spell?

A. That's the worst storm I have been in.

Mr. McKeon: That is all.

(Testimony of Kelly Sprague.)

Cross-Examination

By Mr. Morse:

Q. Do you recall the dimensions of the Neptune?

A. She is approximately 150 feet long.

Q. What horsepower? A. 1400.

Q. So she is a bigger tug than the Sea Fox or Hercules? A. Yes, sir.

Q. What sort of a towing engine do you have on the Neptune?

A. Had an electric towing engine.

Q. Is that one which would automatically ease out and take up——

A. She had an automatic device on her.

Q. So it was an improved type compared to the one that was on the Sea Fox? A. Yes, sir.

Q. What advantage is the towing engine which will ease out and take up on the wire?

A. You can set that so that it will take up at every strain in heavy weather so that you can use more power on the engine of the tug. [136]

Q. It in part compensates for the strain when the strain is put on the wire, doesn't it?

A. Yes, sir.

Q. It acts as an additional safety factor, similar to the anchor chains which are used?

A. Yes, sir.

Q. Did you save your log from the Neptune when it was sunk?

(Testimony of Kelly Sprague.)

A. No, nothing was saved.

Mr. McKeon: Save anything, Captain?

The Witness: Saved most of our lives.

Mr. McKeon: I beg your pardon?

The Witness: Just our lives, that is all.

The Court: That is most important.

The Witness: Yes, sir.

Q. (By Mr. Morse): Approximately what was your position when you received a wireless message on the 14th asking that you come to the aid of the Sea Fox?

A. Approximately 21 hours south of Cape Blanco.

Q. And that would be south of this position?

A. Yes, sir.

Q. And what was the weather at that time in your position?

A. We had strong southeast winds.

Q. It was stormy weather at that time?

A. Yes, sir.

Q. Were you taking green seas over your tug at that time? [137]

A. No, the wind was behind us, we were running with it.

Q. I see. You were headed from a point south of San Francisco or south, back to Seattle?

A. We had just left San Francisco and bound for Seattle.

Q. So that proceeding to the Sea Fox was right in your normal route that you were proceeding to go to Seattle?

A. Yes, sir.

(Testimony of Kelly Sprague.)

Q. So you didn't have to deviate to go to the scene? A. We were on our way.

Q. Now, while you were in the vicinity of the Sea Fox on the night of the 15th, during the night, you were experiencing green seas coming over your tug, weren't you? A. Yes, sir.

Q. On the night of the 15th you approached the Herald of the Morning from the lee side when you went up and spoke to it, didn't you?

A. Yes, sir.

Q. Did you have a Lyle gun aboard your tug?

A. Yes, sir.

Q. Did you use it at any time to attempt to put a line to the Herald? A. No, it was not used.

Q. You did not? A. No.

Q. How was the line put to the Herald of the Morning from the [138] Balsam, by means of the Lyle gun? A. Yes.

Q. When you are maneuvering, when you are free and maneuvering in the sea, when do you have the greatest control over your tug, when you are headed into the weather or when you are—when your stern is toward the weather?

A. When you're headed into it.

Q. When headed into the weather?

A. Yes, sir.

Q. Now, at the time you came in collision with the Herald of the Morning, were you headed into the weather or was your stern into the weather?

A. We were stern into the weather because the ship was being driven with the wind and we had to

(Testimony of Kelly Sprague.)

proceed with the wind. The weather would be on our stern.

Q. I didn't quite understand the explanation.

A. The ship is being driven by the wind and we would have to have our stern towards the wind, too, to keep up with the ship; otherwise you would have your bow into the wind, you would be backing down with the wind and you have absolutely no control of the vessel, the tug.

Q. With your bow into the weather you would have no control over your tug?

A. When you are backing your tug, she would back one way and you're back in a circle. [139]

Q. Now, getting back to the time when you got a line, they drifted a line to you and you picked it up, wouldn't it have been feasible for you to have circled around, come up on the lee side, lee and forward of the bow?

A. That was done, an attempt was made like that.

Mr. McKeon: I have difficulty hearing you.

A. (Continuing): An attempt was made like he mentioned there, but it was the way the *Herald* was drifting. It was impossible to hold the tug in close enough position to get a line to them without endangering the tug *Neptune* or getting broadside and having the *Herald of the Morning* drift on top of her.

Q. I am suggesting after you had received the line from the *Herald*, wouldn't it have been feasible for you to make a circle and come around so that

(Testimony of Kelly Sprague.)

you were forward of the bow and on the lee side?

A. Still have the ship being driven down toward you.

Q. You would have been forward of the beam—forward of the bow of the *Herald of the Morning*. I am suggesting you come up in the lee of the *Herald of the Morning*. You understand what I am trying—

A. I am sorry. I don't quite understand.

Q. With the aid of these models, if the *Herald* was in that position and you had gotten your line here, wouldn't it have been feasible for you to come around in that manner (indicating) so that you would have had your bow headed into the [140] storm?

A. This ship was drifting away, driven from us.

Q. This ship drifting broadside?

A. Yes, sir.

Q. Wouldn't it have been feasible for you to come around so that you had your bow headed into the storm?

A. Like this (indicating)?

Q. Well, that is the way you were at the time you came in collision?

A. How did you want me to go?

Q. I am trying—I am not—I am asking you if it wouldn't have been feasible for you to maneuver this way, or clear around this way, and come up so that your bow was headed into the storm?

A. Not with the line between us and the ship.

The Court: What about the line?

(Testimony of Kelly Sprague.)

The Witness: That would be impossible with this line between us and the ship.

Q. (By Mr. Morse): Couldn't one of your men have walked it over your tug, or around your tug as you made your circle?

A. Even in calm weather it takes a lot of room to turn your tug like that, to make a circle.

Q. There was a whole ocean.

A. Wasn't a whole ocean. There was a line between us, just a short line.

Mr. McKeon: Also drifting ships.

Q. (By Mr. Morse): Anyway, that is your explanation why you [141] didn't do it that way and you didn't think it was desirable to do it that way?

A. Absolutely not.

Q. As I understand you, you said one reason you came up to 75 feet forward of the bow was in order to minimize the weight of the cable which the men on the *Herald of the Morning* were endeavoring to pull aboard the *Herald of the Morning*?

A. Yes, sir.

Q. And where was your bow, the bow of the *Herald of the Morning*, just directly forward of the bow of the *Herald of the Morning*?

A. No, sir, to the windward of the bow of the *Herald of the Morning*.

Q. All right. Approximately what distance?

A. Well, at various distances. It was a heavy sea, both yawing back and forth.

Q. Yes, but at the time you said you were about—at the time you came in collision, as I understand

(Testimony of Kelly Sprague.)

it, you said you were about 75 feet and the wave lifted you and drove you into the bow?

A. Yes, sir.

Q. And what was the angle of your vessel with reference to the fore and aft line of the Herald of the Morning immediately before this wave drove you against the Herald of the Morning?

A. Approximately 90 degrees, or at right [142] angles.

Q. All right, then. There was that 75 feet distance plus the full length of your ship?

A. The length back to the towing machine.

Q. Which would be approximately 130 feet aft, I suppose, from your bow?

A. Approximately, yes, sir.

Q. Had you been on the leeward side instead of on the weather side of the Herald of the Morning, that 120 or '30 feet of line would not have been out, would it? By that I mean your towing engine would have been that much closer to the stem of the Herald of the Morning?

A. Yes, an original attempt was made along that line, but it couldn't be done without danger of our tug broaching the side of the other ship and being driven together.

Q. Will you explain that to me, please? Strike that just a moment.

When you were out maneuvering were you on the windward side, were you able to control your tug out there as to the angle of approach you were making?

A. Yes, sir.

(Testimony of Kelly Sprague.)

Q. Then why couldn't you have controlled your tug if you had gotten on the lee side forward of the bow?

A. Because the ship—I tried that, sir, and the ship drifted away from me.

Q. What had that to do with the ability to control your own [143] tug?

A. I don't quite understand.

Q. The drifting of the Herald of the Morning had nothing to do with your ability to control your own tug, did it?

A. The Herald of the Morning had nothing to do with the control of the tug, no, sir.

Q. I am unclear in my mind on this point of the anchor chain. When you went up and spoke to the Herald of the Morning, did you ask him to drop—I mean, let it go to the bottom of the ocean, the port anchor, so that you could use the port anchor chain?

A. I asked him if he had any chain and he said no and I asked him if it was possible to lower it down to the first port, first shackle, connecting shackle, and he threw his hands up in the air. As far as chains were concerned, they were all finished, that the Sea Fox had used up all their chain.

Q. And was he referring to his port anchor or referring to his starboard?

A. I didn't care which chain it was. All I wanted was a piece of chain.

Q. Could you see the starboard chain hanging in the water?

(Testimony of Kelly Sprague.)

A. I knew that the hawser of the Sea Fox was fastened to it.

Q. Now, when you said the Herald of the Morning had drifted from the time you were in collision until a subsequent time, I don't remember exactly now what it was, she had drifted about [144] ten miles nearer shore, did she drift due east toward shore or did she drift upward, up the coast and toward shore?

A. Up the coast and toward shore.

Q. And the wind would have been from which direction?

A. More in the southwest direction, or southerly.

Q. You said that the Balsam shot a line to the Herald of the Morning when you were aboard the Balsam?

A. Yes, sir.

Q. And they succeeded in getting their ten-inch line to the Herald of the Morning?

A. Yes, sir.

Q. So obviously the men of the Herald of the Morning were able by the strength of their own efforts to pull that line aboard?

A. They used a manila line which will float on the water. We had a heavy steel cable.

Q. But they did succeed in getting it aboard?

A. Yes, sir.

The Court: How was the sea at that time?

The Witness: Very rough.

Q. (By Mr. Morse): About how far forward of

(Testimony of Kelly Sprague.)

the *Herald of the Morning* was the *Balsam* when this operation was being conducted?

A. Would you repeat that?

Mr. McKeon: At the time she shot the line [145] out?

Q. (By Mr. Morse): When they put that ten-inch hawser over, how far distant was the *Balsam* from the *Herald of the Morning*?

A. I was below decks observing this through a porthole on the side towards the *Herald of the Morning* and he made the same approach I did and it looked for a minute like the same thing was going to happen to him that did to me. He was being driven right into the bow of the ship.

Q. Well, you still haven't answered my question. Approximately what was the distance between the two vessels? What would you say the minimum distance was?

A. I would say about 75 feet, observing from where I was.

Q. And you said he made the same approach. Now, during the night or early morning hours, dark hours of the 16th, you came up on the lee side. Was the *Balsam* on the lee side?

A. Was the *Balsam* on the lee side?

Q. Yes, sir.

A. When they put the line aboard?

Q. Yes, sir.

A. No, he was on the bow of the ship.

Q. Forward? A. Forward.

Q. Now, bearing in mind the fact that the *Her-*

(Testimony of Kelly Sprague.)

ald of the Morning was drifting broadside to the wind, isn't it a fair statement to say that the Balsam was not on the weather side of the Herald of the Morning? [146]

A. She would be on the weather side in the same respect we were.

Q. Well, let us put it this way: Was the wind blowing in the same direction that the waves were, the line of the waves were? A. Yes, sir.

Q. So that if the wind was coming from the southwest, then the waves also were coming from the southwest? A. Yes, sir.

Q. So what would right angles to the southwest be? A. Southeast.

Q. Southeast and northwest?

A. Northwest would be—yes, sir.

Q. With the wind and waves coming from the southwest and the Herald of the Morning being broadside— A. Yes, sir.

Q. Then the bow of the Herald of the Morning would be pointed northwest; is that a fair statement? A. Yes, sir.

Q. And that was the approach the Balsam—to the northwest of the Herald of the Morning when it put its ten-inch line aboard? A. Yes, sir.

Q. When you were thrown against the bow of the Herald of the Morning, were you directly forward of the bow or were you a bit [147] toward the weather side of the bow?

A. The bow of the Herald of the Morning struck our side.

(Testimony of Kelly Sprague.)

Q. I understand that——

A. About 20 feet back on the starboard side.

Q. My question—I guess I don't make myself clear.

What was your position with reference to the fore and aft length of the Herald of the Morning? Were you directly ahead of the Herald of the Morning or were you on the weather side of that position?

Mr. McKeon: He said he was at an angle of about 90 degrees.

A. And slightly ahead of the ship in order to keep clear, had to keep kicking toward the ship.

The Court: There are two models here. You might——

Mr. McKeon: He has shown it on the models already.

Q. (By Mr. Morse): In order to clear it up in my mind again, will you show me your position?

A. There is the Herald right there (indicating), slightly ahead and at right angles, approximately right angles.

Q. All right, with the Herald of the Morning being broadside to the wind and waves?

A. Yes, sir.

Q. Your position would have been on the port, not on the weather bow, wouldn't it?

A. Yes, the same as the Balsam, ahead and to the weather side. [184] This tug here has a tendency to broach the same as that, and I ran slow,

(Testimony of Kelly Sprague.)

I don't have the control, dead slow, I have to kick it stronger to keep it fore and aft with the wind.

Q. With reference to the fore and aft dimension of the Herald of the Morning, what was the angle of the fore and aft dimension of the Balsam when they were in this process of putting this line aboard?

A. I am at this time down below inside the Balsam looking out of a porthole, but I would say approximately at right angles.

Q. Were you on deck when the ten-inch hawser pennant parted?

A. I observed that through the porthole, sir.

Q. It is a little bit confusing to me. I don't know that it is an important point, but it wasn't the ten-inch hawser itself?

A. I didn't mean that it was—it was a wire pennant attached to the hawser.

Q. And that was on the Herald of the Morning or on the hawser of the Balsam?

A. On the Herald of the Morning.

Q. The Balsam came out of the Columbia River on the 14th of November, didn't it?

A. I don't know. She was there when we arrived there.

Q. So you don't know from which area she came?

A. I know that she is stationed in Astoria.

Q. The Balsam took you into Astoria, didn't they? [149]

A. Yes, sir.

Q. This was on the 16th, during the height of the storm?

(Testimony of Kelly Sprague.)

Mr. McKeon: The 17th.

The Witness: No, the next morning. We stayed there that night—no, the evening of the 17th.

Q. My records show two or three o'clock in the afternoon of November 17 they went into Astoria.

Mr. McKeon: They may have left at that time.

A. We arrived around 5:00 o'clock in the evening of the 17th.

Mr. Morse: No further questions.

Redirect Examination

By Mr. McKeon:

Q. Captain, having in mind this discussion about getting over on the opposite side of the bow than the one you did operate on and trying to work in to get a line aboard that vessel, what you did was your best judgment at the time, wasn't it?

A. Yes, it was, and still believe that would be the only way to approach the vessel in those conditions.

Q. You not only had the situation of trying to protect your own tug, but also trying to do a job there, weren't you? A. Yes, sir.

Q. And you would have to take into consideration the weight of the cable that you had to get up from the other side and the control of the tug at the same time?

A. Yes, sir, in keeping the towline clear of the propellers [150] so we wouldn't be disabled.

Q. That is always a real danger, isn't it?

(Testimony of Kelly Sprague.)

A. Yes, it is.

Q. And if you got your propeller fouled, you would be through? A. Yes, sir.

Q. Talking about the Neptune, she is rated as 1400 horsepower? A. Yes, sir.

Q. Does she have any more power than the Hercules or the Sea Fox?

A. They are rated at 1200, but——

Q. I am talking about a comparison.

A. No.

Q. You get as much power out of the Hercules as you will out of the Neptune?

A. I just made two identical trips to Panama, one on the Hercules, which is a sister ship of the Sea Fox, and got off her and made the identical trip with the Neptune; we made the same speed.

Q. She is the equivalent in power?

A. Yes, sir.

Q. She is the standard large-sized ocean-going tug? A. Yes, sir.

Q. And they are new tugs, aren't they?

A. Yes, they were built by the Army.

Q. 1944 and 1946 periods? [151]

A. Yes, sir.

Q. I am talking about the Sea Fox and the Hercules.

A. Yes, sir, they were built by the Army during the war.

Q. And they are known as the Mickey type, aren't they? A. Yes, sir.

(Testimony of Kelly Sprague.)

Q. None of those types have the automatic re-leasing gear? A. No, they don't.

Q. They have standard equipment?

A. Yes, sir.

Q. And the drum is constructed for an inch and three-quarters, for 1¾-inch towing wire?

A. They have a spooning device and the only size wire that will work on there.

Q. But they are built for that particular size wire? A. Yes, sir.

Mr. McKeon: I think that is all.

The Court: Step down.

Call your next witness.

Mr. McKeon: Captain Sommer. Is Captain Sprague free now?

Mr. Morse: Yes.

The Court: He may be excused.

Mr. McKeon: You are excused, Captain, and thank you very much. [152]

RUDOLPH K. SOMMER

was called as a witness on behalf of the libelants; sworn.

The Court: What is your full name?

A. Rudolph K. Sommer, S-o-m-m-e-r.

Q. What is your business or occupation?

A. Captain of a tug, the tug Sea Fox.

Q. Captain of the Sea Fox? A. Yes, sir.

Q. How long have you been on the Sea Fox?

A. About six years.

(Testimony of Rudolph K. Sommer.)

Q. Six years? A. Yes, sir.

Q. And where? Did you have any regular run?

A. No, just towing around the Bay.

The Court: All right.

Direct Examination

By Mr. McKeon:

Q. General tugboat service. I am going to try to be brief and not cover all the territory we covered with the other witnesses. Were you master of the Sea Fox leaving here with the Herald of the Morning in tow? A. Yes, sir.

The Court: I will offer a suggestion. Tell us what you know. What happened after you left?

A. Leaving San Francisco—it was on November the 5th—and after getting out through the Golden Gate on the 6th—I forgot [153] some of the dates; I am confused on the dates—we ran into a strong northwest gale just this side of Point Arena and the tow was going from right to left; we couldn't control the tow; it was out of control. At that time we signaled to the Herald of the Morning to slack out another extra length of chain, another shot, which they did, but the ship still wouldn't straighten out.

And we proceeded going ahead with the ship and the tug and were making sternway. Then on the afternoon of the—I will have—can I have the log to see the date?

The Court: Do you have a log?

(Testimony of Rudolph K. Sommer.)

The Witness: Yes.

Mr. McKeon: Yes, sir.

Mr. Morse: This is it: Respondent's Exhibit A for identification.

Mr. McKeon: This is the same that Reichel was on, Your Honor.

The Court: Did you make any entries on the log yourself?

A. Yes, I did; yes, sir.

Mr. McKeon: I think each officer on watch makes his entries, Your Honor.

The Court: What day was it?

The Witness: It was on the 6th and 7th—on the afternoon of the 7th, towing wire parts and the ship is on her own, drifting out. We tried to get another wire aboard that night, [154] but the crew of the ship had a hard time, difficulty in letting go of the chain, so we just stood by that night. We put an extra wire aboard the ship on the morning of the 8th, and after we got the wire aboard we had difficulty—the wire got fouled on the drum, so we only got about, oh, three or four hundred feet of wire out and we proceeded towing toward Drake's Bay.

In the meantime, we communicated with the San Francisco office and they sent another boat on out to assist us, the Sea Prince came out and took over the tow, towed her into Drake's Bay and we followed on in, clearing our drum to get the other wire off the Sea Prince.

After the wire was transferred from the Sea Prince to the Sea Fox's towing drum, we proceeded

(Testimony of Rudolph K. Sommer.)

to tow the ship to Everett, and we had then again ran into northwest gales, heavy seas.

Mr. Morse: May I interrupt, please? When you say "northwest gale," what wind force are you referring to?

The Witness: Around 25, 30, blowing along in there.

Mr. Morse: What would it be on the Beaufort's scale when you refer to a gale?

The Witness: Well, that would be about 8, 10, a gale.

Mr. Morse: That is 25-30 miles an hour you described the Beaufort scale as 8 to 10. It is easy to describe those wind forces——

The Witness: You want what the wind force was?

Mr. Morse: Yes. [155]

The Witness: O.K. That is on the 7th.

Q. (By Mr. McKeon): You were on your way up out of Drake's Bay?

A. On our way north.

Q. Run into some other weather around the 13th or 14th? A. Yes.

Q. By the way, did you lose your towing board before your hawser parted on the 7th?

A. Yes, sir, the towing board went over the side. We couldn't get that back in again on account of the weather.

The Court: When was that?

The Witness: On the 7th. The towing board goes over the side, and the wire, when that is over the

(Testimony of Rudolph K. Sommer.)

side, the wire just kept on running around the stern, no protection for it.

Q. With the Herald swinging starboard to port?

A. Swinging starboard to port, causing the wire to chafe.

Q. Turn to the 13th or 14th, Captain, and then go on, if that is what the Court wants. When did you next run into some bad weather?

A. On the 14th.

The Court: What happened on the 14th? Tell us about it.

Q. (By Mr. McKeon): Captain, tell us about it from your recollection, if you have one.

A. On the 14th we encountered stormy weather, strong southeast about 8, 10 force, 8 to 10, between that, and the towing winch [156] the wire slips out and we couldn't hold the drum. The gears let go, so we had to put a piece of wire—iron into the gear on the starboard side of the drum and block off the winch so she couldn't pay out any more.

Q. That was to try to secure her, the drum?

A. Secure the engine on the tug.

Q. Then what happened?

A. Then we were drifting with the Herald toward the beach. It was off Tillamook, I am pretty sure, that night, about twenty miles. We contacted the Coast Guard, San Francisco office. The Coast Guard sent the Balsam out from the Columbia River. She arrived on the scene around 10:00 o'clock at night. She tried to get a line aboard the ship, but couldn't do so on account of the heavy sea.

(Testimony of Rudolph K. Sommer.)

So we proceeded slow, half speed, straight out to sea with the *Herald of the Morning*. That afternoon the office contacted us and told us that the *Neptune* was on her way north. She arrived on the scene, it was around—I don't know what time that was—at any rate, she arrived on the scene and due to the heavy weather, tried to get a line aboard; couldn't make it.

So she stood by for the rest of the evening. That night, about, oh, I would judge, about 12:30, 1:00 o'clock our hawser parts.

Q. How was the weather then?

A. It was blowing a gale at that time, a strong gale, about, [157] I should judge, about 10, 10 and 8 force. So then the *Herald of the Morning* was on her own, drifting. So in the morning the *Neptune* tried to get a line aboard; she had great difficulty in doing so. How many attempts she made—I think she made two or three attempts and the last attempt, why, she got hit.

Q. She what?

A. She got hit on the—made contact with the ship's bow and got in collision with the ship, stove a hole in on her starboard quarter, I think it was amidships somewhere, and she floundered around and finally sank, and they rescued the crew, the Coast Guard took the crew off the *Neptune* and after they took the crew off, the *Balsam* started out after the *Herald of the Morning*. The *Sea Fox* stood by the *Neptune* until she sank.

Q. Who directed you to do that, if anyone?

(Testimony of Rudolph K. Sommer.)

A. The commander of the Coast Guard, the Balsam.

The Court: From the time of the collision, what time elapsed until the boat sunk?

The Witness: Oh, it took her about five hours to sink, I imagine.

Q. (By Mr. McKeon): Several hours?

A. Took several hours to sink her, slow sinking. So after the Neptune sank, why, we radioed the Coast Guard and got our position and we headed for the Herald of the Morning which—she was drifting over toward, close to Grays Harbor.

Q. That is north of the Columbia River? [158]

A. Yes. So we got there, why, the Herald of the Morning was still drifting towards the beach and the Coast Guard commander on the Balsam radioed us and said she would be on the beach by midnight and for us to hurry up and get there. So we went as fast as we could get there. When we got there, why, I signaled over to the captain of the Herald of the Morning to drop his anchor, which he did, but he didn't give her her chain, so we went around the stern and told him to give all the chain he had and he gave it nine shots of chain and she held then, she laid quiet for the night. The sea moderated a little during the evening and——

Q. Had she been dragging?

A. No, I don't think she dragged any because she got bearings off the Balsam, she seen the bearings she was holding. She may have dragged a little be-

(Testimony of Rudolph K. Sommer.)

fore they gave her the nine shots; after that she was holding pretty well.

So the morning the Balsam, she left and the Wionona appeared on the scene. So in the morning around 10:00 o'clock, why, she sent a twelve-inch line aboard with a shot and made—they made it fast to the bitts of the Herald of the Morning and gave us the other bitter end which we made fast to the wire pennant we had and we kept on slow ahead all that night until the Hercules arrived on the scene.

Q. The next day?

A. Whole afternoon, that night, and the next day—the Hercules [159] arrived on the scene. Sea and wind was kind of moderated, but it picked up again that night when we started towing, a full gale——

Mr. Morse: Full gale. What force are you referring to?

A. Well, around 8 and 10, a pretty good gale, and we had that all, practically all the way up. But there was some difficulty in letting go of the—we were always getting in irons before we got away from the Herald of the Morning, getting in tow again, on account of the wind and sea, the anchor chain was fouled, wouldn't let go.

The Court: Anything else happen?

The Witness: That will be all that I know of now.

Q. (By Mr. McKeon): You have now taken us up to the point where you now got that manila

(Testimony of Rudolph K. Sommer.)

to the Herald and you were standing by?

A. Yes.

Q. And the Hercules arrives? A. Yes.

Q. And the Hercules arrives and got a line aboard the Herald? A. Yes.

Q. Did you observe the conditions at that time? How were the swells, for example?

A. There was a moderate swell at that time when we started towing.

Q. At the time you started towing? [160]

A. But the wind was commencing to pick up a little from the southwest and shifted around to southeast.

Q. Was the wind hauling around differently, from different directions?

A. Southwest that day she was anchored, that night was quite a swell running, though.

Q. Then you got on your way, the Hercules having the Herald in tow up the coast? A. Yes.

Q. Did you strike any blow thereafter? Both had them in tow?

A. Yes, it was fast getting a storm.

Q. What would that be in miles, roughly?

A. I should judge around 55, 60 miles.

Q. And you eventually brought the Herald into Everett and put her alongside—would that be on the 19th? A. I believe it was the 19th.

Q. Look at it and see if that is the time.

A. Yes, it was on the 19th.

Q. In your judgment, Captain, with the weather you experienced there and knowing the conditions

(Testimony of Rudolph K. Sommer.)

of the tow and tug, do you think it would have been prudent or good judgment to have attempted to take that tow in over the Columbia River bar?

A. No, I do not.

Q. How far south of the Columbia River were you at that time?

A. South of the Columbia River? [161]

Mr. Morse: Which time are you referring to?

The Witness: I don't—

Mr. McKeon: On the 14th.

A. On the 14th? Oh, no idea.

Q. Roughly.

A. Let's see. On the 14th, left Grays Harbor—well, make it about 40, 45 miles, something like that.

Q. And in the exercise of your best judgment you and your mates concluded to put out to sea?

A. Yes.

Q. Headed right out to sea?

A. Headed right out to sea, yes, sir.

Q. That is what you would have done off San Francisco in the same situation, isn't it?

A. Yes, sir.

Q. Taking a large tow in over the bar is quite a different thing than a powered ship going in or out? A. Yes, quite a lot of difference.

The Court: We will take a recess.

(Short recess.)

Mr. McKeon: Before I forget it, I would like to interrupt, if the Court please, to have the Captain, if he will, look at the amendment to the libel which sets forth the names of the men aboard his

(Testimony of Rudolph K. Sommer.)

tug, the Sea Fox, at the time. That is the list there, Captain? [162]

A. Yes.

Q. That is correct?

A. Yes.

Mr. McKeon: Then let the record show that the Captain has identified the personnel on his tug as shown by the men named in the amendment to the libel.

Mr. Morse: This would be a good time, perhaps, to mention about the valuation of the Herald of the Morning. I phoned Captain Pillsbury last evening and he stated he would be unwilling to agree to the low valuation I mentioned yesterday. He thought the valuation of \$375,000 would be about the minimum he could fairly place.

Mr. McKeon: I would stipulate, if the Captain were called, he would testify that the minimum value he would put on the vessel would be \$375,000.

The Court: Let the record so show.

Q. (By Mr. McKeon): During these times, Captain, that you were describing, let us say, on the 16th when you had hold of the Herald, were you shipping seas?

A. Yes, sir.

Q. Taking green water?

A. Yes, sir.

Q. And after your hawser parted, did you put out after the Herald?

A. Yes, sir. [163]

Q. And would those—I think you classified that as a strong gale at that time?

A. Yes.

Q. Did that condition continue pretty much that night?

A. Yes.

Q. Now, what was the situation with respect to endangering your men in that sort of weather?

(Testimony of Rudolph K. Sommer.)

A. Endangering the men?

Q. Yes.

A. Well, they were in danger, yes, could have been washed overboard, got hurt with a wire or something.

Q. In your opinion, Captain, was the *Herald* of the Morning after your wire parted, in danger?

A. Yes, she was.

Q. What kind of danger would you——

A. Well, drifting toward the beach.

Q. In other words, unless she was rescued or her anchor held, she might go ashore?

A. Yes.

Q. I suppose there is always the danger of a drifting vessel colliding with another vessel, too?

A. Yes.

Q. Did that vessel, the *Herald*, at that time, have navigation lights?

A. Well, if she did they were very poor; you couldn't see them. [164]

Q. You had trouble seeing them?

A. Yes, you couldn't see no lights, even on that night you couldn't see any lights.

Q. She didn't have any power aboard?

A. No power, no color lights, I imagine.

Q. And she was flying high out of the water?

A. Out of the water high.

Q. What was the effect, what would the effect be of a vessel flying so high in those strong winds?

A. Well, she's just helpless.

The Court: Bobbling around like a cork.

(Testimony of Rudolph K. Sommer.)

The Witness: Like an empty box, you know.

Mr. McKeon: I prefer Your Honor's description.

The Court: I think somebody used "cork," some one of the other witnesses.

Q. (By Mr. McKeon): Did the Balsam give you any indication of the time it was calculated the Herald would go ashore?

A. Yes, they radioed us and told us to get up as soon as we could since the Neptune sunk, she would be on the beach by midnight, they figured.

Q. Then when—were you trying to get her into a position in shoal water where you might get her anchors down?

A. No, she was just drifting. We just went up to her when we got there, told her to drop the anchor, about 30 fathoms of water. [165]

Q. Did you have any discussion with the master or anybody else on the vessel about letting go that anchor?

A. I hollered over to the master and he hollered back it was the captain's orders to drop the anchor; I told them it was the captain's orders to drop their anchor.

Q. Did it take some time?

A. Took a little.

Q. To get a meeting of the minds on that?

A. Yes, it took a little time to get going on that. Finally the anchor went down.

Q. In that connection, what were your directions

(Testimony of Rudolph K. Sommer.)

with respect to the number of shots they should let go? A. Nine shots.

Q. Did they let go nine shots?

A. Not at first; only about four or five shots. Of course, she was still drifting.

Q. You don't know whether they let go any additional shots? A. No, I don't.

Q. About how long, if you remember, did it take for the Hercules, after her arrival, to get a line fast, or how long was she engaged in doing it?

A. Well, about three hours, two and a half hours, three hours.

Q. Could you tell whether or not the men on the Hercules were working on deck?

A. Not at that time. [166]

Q. Couldn't tell? A. I couldn't tell, no.

Q. Captain, beaing in mind the blow that you got into on the night of the 18th when you had the Herald in tow of the Hercules and yourself, you recall that night, that blow? A. Yes.

Q. If that blow had occurred while the Herald was at anchor, the one anchor down, do you think she would have been able to weather it?

A. No, she wouldn't have been able to weather it.

Q. What do you mean by that?

A. Because she wouldn't on account of the heavy seas, she would drag the anchor and go for the beach.

Q. In other words, a single anchor would not have held her?

A. No, one anchor would not hold her, no.

(Testimony of Rudolph K. Sommer.)

Mr. McKeon: I think that is all.

Cross-Examination

By Mr Morse:

Q. Captain, do you have your master's license with you? A. No, sir, I have not.

Q. I beg your pardon? A. No, I haven't.

Q. You have a master's license?

A. Limited.

Q. Limited? [167] A. Limited.

Q. Limited to what area?

A. San Francisco Bay and tributaries.

Q. You do not—— A. Lakes and sounds.

Q. You do not have a master's license permitting you to—— A. No.

Q. ——be captain of ocean-going vessels?

A. No.

Mr. McKeon: What ocean-going vessels are you talking about? Wasn't obligated to have a master's license for this tug, if that is what you mean.

Mr. Morse: I was asking him if he did have one.

Mr. McKeon: You said "vessels," I want it to be clear.

Q. (By Mr. Morse): You do have a master's license on—— A. No.

Q. Are you obligated to have a master's license unlimited to captain the Sea Fox offshore?

A. No.

Q. How long have you served as master on an ocean-going tug?

(Testimony of Rudolph K. Sommer.)

A. How long? Oh, about two years.

Q. Was this, the occasion of this incident the first time you served as master of an ocean-going tug?

A. No, no.

Q. How many voyages? [168]

A. I had about 16 trips up the coast, 16 or 17.

The Court: 16 trips up the coast.

Q. (By Mr. Morse): Prior to the *Herald* of the Morning trip?

A. I towed four ships up the coast before that.

Q. Captain, is it a fair statement to say that the storm that you experienced on the 10th was the worst storm you had ever experienced in your sea career?

A. Yes, it was, it really was a storm.

Q. Is it a fair statement to say that the entries made in the course—Strike that.

Did you examine the entries made in the log as to the positions and weather conditions from time to time on this particular voyage?

A. Yes.

Q. And they are accurate as you observed them?

A. As accurate as I can remember, yes.

Q. So that if the log showed a wind force of 6 or 7, say, on a given date, that would have been a fair representation of the existing conditions?

A. Yes.

Q. As I understand it, you lost your towing board before you put back into Drake's Bay?

A. The towing board went over the side.

Q. Was that towing board replaced?

A. Yes, we had another, we had another one on board. [169]

(Testimony of Rudolph K. Sommer.)

Q. And did you put on the extra one?

A. We put on the extra one after we left Drake's Bay.

Q. Was the towing board which you lost fixed to the end of the wire which went overboard?

A. Yes.

Q. That was how you lost the board, is it?

A. Yes.

Mr. McKeon: What is that question and answer?

(Record read.)

Mr. McKeon: What were?

Mr. Morse: This is the Drake's Bay incident.

Mr. McKeon: What wire went overboard?

The Witness: The wire parted.

Mr. McKeon: That is not overboard. There is no testimony any wire went overboard then.

Mr. Morse: Well, Mr. McKeon, that is my recollection of it: it parted and went in the—also one went overboard. That is the only thing I meant.

Mr. McKeon: Well, the towing board parted. I think the witness testified the towing board parted before and prior to the wire breaking, so that the board couldn't go overboard with the wire at that time, is that right?

The Witness: The board went overboard with the wire—the board went over the side first.

Mr. McKeon: Yes. How long after the board went over did [170] the wire part?

The Witness: Oh, that was about two or three hours.

(Testimony of Rudolph K. Sommer.)

Mr. McKeon: That is what I am talking about. It is so easy to just answer a question that you don't understand and then you have explanations afterward.

The Court: We will blame it on the lawyers.

Mr. McKeon: That was the reason, the question hit me in the eyes, wasn't any testimony of wire going over.

Q. (By Mr. Morse): When you went up to the Herald of the Morning on the night of the 16th and told her to drop her anchor, did you tell her immediately that you came in the vicinity of her?

A. Yes, we did, yes.

Q. Had you been told by the Balsam to instruct him to drop his anchor at the 30 fathom line?

A. No, the Balsam, the Balsam radioed us and told us to tell them to drop their anchor when we got up there. They would be on the beach if they didn't.

Q. Didn't the Coast Guard vessel Winona arrive before the Balsam took the Neptune trip to Astoria?

A. Yes.

Q. And the Winona remained in the vicinity until the Balsam returned? A. Yes.

Q. And also remained in the vicinity until the Hercules came [171] to the scene?

A. The Hercules arrived.

Q. And it was only after the Hercules arrived that the Winona left? A. Yes.

Q. Did the seas continue, green seas continue to

(Testimony of Rudolph K. Sommer.)

come over the Sea Fox on the morning of the 16th after the line had parted? A. Yes.

Q. Does your logbook show the positions, your noon positions as you were proceeding up the coast?

A. Some of them, yes, shows some of the positions, not every day. It was dead reckoning most of the time.

Q. It was overcast so that you were unable to take sights?

A. Yes, and we were steering various courses, too, on account of the wind, heading out mostly all the time.

Q. You were in sight of shore most of the time?

A. Yes.

Q. But the positions, they were as accurate as you could compose them? A. Yes, sir.

Q. Was the threader on your winch broken or disrupted? A. The what?

Q. The threader. A. Threader? [172]

Q. Threader, I think that has been called——

Mr. McKeon: The traveler.

The Witness: The traveler. Yes, that was broken.

The Court: What is the traveler?

The Witness: It is a——

Mr. McKeon: A device to——

The Witness: Wind in the wire.

Mr. Morse: To put the wire in the proper position when it winds on the winch.

The Witness: Coils the wires.

The Court: Guides it?

(Testimony of Rudolph K. Sommer.)

The Witness: Yes, guides it.

Q. (By Mr. Morse): Was it affected in the Drake's Bay incident?

A. No, after that, the night we had the heavy blow which carried it away the second time.

Q. (By Mr. Morse): The night of the 16th then? A. That is when she got in the strain.

Q. It had not been affected prior to the night of the 16th, night of the 15th, I should say.

A. No.

Q. That is correct? A. Right, yes.

Q. This is a little bit confusing, because we have several instances here. As I understand it, the teeth of your gear broke on the 14th? [173]

A. Yes.

Q. Was that the time when the traveler was damaged?

A. Yes, I guess it was, I don't remember now.

Q. You are not sure whether it was at that time or when the wire—— A. No.

Q. ——broke away?

A. No, I don't remember.

Q. Did you ever use a bridle when you tow a vessel?

A. No, sir, never use a bridle, always use the anchor chain for a spring.

Q. Did you ever use—the anchor chain will come out of one bow, say, the port bow? A. Yes.

Q. Let us call it the starboard bow, because it was the starboard chain of the Herald.

A. Starboard chain.

(Testimony of Rudolph K. Sommer.)

Q. Had you ever had occasion to use a preventer wire or guy from the port bow to hook forward on the chain? A. No.

Mr. Morse: I have no further questions.

Redirect Examination

By Mr. McKeon:

Q. You didn't have anything to do with making up this tow, did you, Captain?

A. No, sir. [174]

Q. The surveyor to the underwriters is the one that took charge of that?

A. Yes, I presume so.

Q. These figures that are down, that you have mentioned, 7, 8 and 10 on the Beaufort scale, you haven't any machine to measure those forces, have you, aboard the tug? A. No, we have not.

Q. And you are just giving us the estimates of the men who——

A. The Balsam radioed us that night.

Q. I am not talking about the Balsam, Captain—I am talking about——

A. No, we have got no machine.

Q. Wait a minute. Let me ask the question. What I am asking you is, the 7, 8 and 10 figures that you have mentioned are supposed to be on the Beaufort scale? A. Yes.

Q. They are estimates of your tug?

A. Yes.

Q. And they are estimates of somebody who figured that was the force of the wind at that time?

(Testimony of Rudolph K. Sommer.)

A. Yes.

Q. They may be off or on, they may be high or low?

A. Yes.

Mr. McKeon: That is all. [175]

Recross-Examination

By Mr. Morse:

Q. Did you keep a radio log on your vessel?

A. No, sir.

Q. You did communicate with your owners and told them you were in trouble?

A. Yes.

Q. What instructions did you receive from them?

A. Well, they told us that the Neptune was on her way from—north, that she would assist us.

Q. Did you ask for assistance from any of the Foss tugs?

A. No, sir.

Mr. Morse: No further questions.

Mr. McKeon: That is all, Captain.

The Court: Step down. [176]

Mr. Morse: While Captain Sprague is here, I would like to ask him one further question, if I may do so.

Q. Captain, had you not been contacted by the Sea Fox interests, would you have put into the Columbia River during the storm or would you have proceeded on to Seattle?

Captain Sprague: Proceeded on to Seattle.

Mr. Morse: Thank you. No further questions.

The Court: Call your next witness.

Mr. McKeon: Captain Flagstad.

GEORGE OLAF FLAGSTAD

called as a witness on behalf of the libelants; sworn.

The Court: What is your name?

A. George Olaf Flagstad.

Q. How long have you been going to sea?

A. Oh, about fifty years.

Q. How long have you been acting as a master?

A. Forty years.

Q. Forty years. All right, proceed.

Direct Examination

By Mr. McKeon:

Q. What part of that time has been in the tug-boat business, Captain? A. About 35 years.

Q. I show you an amendment to the libel——

The Court: I think you can enter into a [177] stipulation.

Mr. Morse: Stipulate, if you say, Mr. McKeon, those are the members of the crew, I will accept it.

Mr. McKeon: All right.

The Court: All right.

Mr. McKeon: They are.

Q. Captain, we are trying to get you back to Seattle. A. Thank you.

Q. Will you tell the Court when you started—you were the master of the Hercules?

A. Yes, sir.

Q. Will you tell the Court when you started from Seattle?

The Court: And what happened after you started.

(Testimony of George Olaf Flagstad.)

Mr. McKeon: And what happened after that.

A. Left Seattle and, oh, about 1:30, 1:40 in the morning of the 17th, I think it was, and there was a storm, a southeaster—

Q. Speak up.

A. And in the Straits going down, there was a good strong southeaster, but coming out of the Cape it kind of lulled down some.

Q. The Cape—you mean Cape Flattery?

A. Yes, sir, and got down to, off Grays Harbor about, I think it was about 11:30 that night, and we were looking for the Fox and the Herald.

Q. Searching around for them?

A. Yes, and we cruised around there for about an hour or half [178] hour or so, because our report in Seattle said she was supposed to be about four miles north of Grays Harbor. And then we finally contacted the Sea Fox.

The Court: Where did you contact her?

The Witness: Cruising around off Grays Harbor.

The Court: About what time, approximately?

The Witness: Oh, approximately 1:00 o'clock in the morning.

The Court: 1:00 o'clock, that would be the 18th?

The Witness: Yes, sir.

The Court: What happened then?

The Witness: Well, he had told us, as near as I can remember, he was off Willapa, that is shoal water.

The Court: In shoal water?

(Testimony of George Olaf Flagstad.)

Mr. Morse: May I interrupt? We have a chart of this area, if you would like to see it, Judge.

The Court: Wait for his testimony.

Mr. Morse: All right.

The Court: And then we can check up on the details, if you wish.

The Witness: We proceeded down there and we looked for them, waiting for an anchor.

The Court: How far up was she?

The Witness: Oh, I should say about 10 or 12 miles offshore, somewhere around in there.

Q. You finally came up during the night? [179]

A. Yes, sir.

Q. What was that, the night of the——

A. That was the morning of the—we got down to him about 3:00 o'clock in the morning, somewhere around there, I don't remember.

Q. What date is that?

A. Morning of the 18th.

Q. On the 18th, and did you speak to the Herald upon arrival in the morning, early morning of the 18th?

A. Yes, we intended to give them a wire, because the weather wasn't very bad. We had a westerly swell, kind of a southeast chop, but suggested we wait until daylight because they had no—hadn't any lights, only flashlights, or something, I guess.

Q. Who suggested?

A. I don't know, somebody.

Q. Somebody on the Herald?

A. On the Herald, yes, sir.

(Testimony of George Olaf Flagstad.)

The Court: All right, what happened? Tell us.

Q. (By Mr. McKeon): Tell us the story.

A. Then we cruised around there until daylight.

Q. What did you do?

A. Daylight came, then we went over on this other side, tried to get the wire up, up to the tug, but we had to straighten and pull away; we tried twice, but almost got into the Sea Fox hawser and also into the anchor chain of the ship. Did [180] get a hand on to us a second time, but we were so close up we had to drop everything and get out of there. So I went around the stern and on the lee side and we got a wire up there to them on that side on the—but you see, we didn't want to put the wire on the same side as the Fox had his manila hawser secured. That wire would chew his hawser, that is why we went on the weather side first.

The Court: All right. What happened?

The Witness: We had to go and put it on the same side as the Sea Fox had his hawser up.

Q. (By Mr. McKeon): At that time how were the swells and sea?

A. She was increasing all the time.

Q. Increasing?

A. Yes, sir, getting a stiff southeaster then and kind of a ground swell.

Q. Approximately how long from the time you started to get your line aboard the Herald that morning of the 18th did it take before you had your line secured?

(Testimony of George Olaf Flagstad.)

A. Well, I should judge about an hour and a half.

Q. And after you had your line secured, what time did she get under way with the Herald?

A. After 10:00 o'clock some time, I think it was, because by then they couldn't let go the anchor chain on the ship, so we stayed there and in the meantime got in irons and took about an hour, took almost an hour, I think it was, before we got [181] out.

Q. What was the effect of your tug getting in irons?

A. The wind caught her and the sea kept washing down on us all the time, went broadside into it.

Q. In that situation with the tug in irons, is the tug practically helpless?

A. Yes, it was to a certain extent, as long as the ship couldn't let go of the anchor.

Q. Was there in that experience that you had, was there a risk of—a real risk of danger of a collision between you and the Fox or the Herald?

A. Well, it could have been.

Q. I am asking you if there was a danger of that? A. Well, there was to a certain extent.

The Court: In what respect?

The Witness: If the wind had kept on coming up more, we naturally would drift alongside wrong end to (witness slapping hands).

The Court: We are getting a record on you. The

(Testimony of George Olaf Flagstad.)

shorthand reporter is taking down every word you say. All right.

The Witness: I am sorry.

Q. (By Mr. McKeon): Then after you got under way, you had your steel hawser made fast to the Herald? A. Yes, sir.

Q. And the Sea Fox had a twelve-inch manila made fast to the Herald? [182]

A. Yes, sir.

Q. Were either one of those lines made fast to an anchor chain on the Herald? A. No, sir.

Q. They were on the top side of the Herald?

A. On the deck somewhere.

Q. And your hawser wire was around your drum? A. Yes, sir.

Q. And the Sea Fox had the manila secured in some manner to the Herald from her drum?

A. Yes, sir.

Q. Now, as you went up the coast with the Herald in tow, did you encounter any weather?

A. Yes.

Q. Or seas?

A. It kept increasing all day.

The Court: The 18th or 19th?

The Witness: This was the 18th.

Q. (By Mr. McKeon): 18th, your Honor, and during the evening of the 18th, would you examine about what the blow was?

A. Oh, I know we had slowed down off Destruction Island, of course, starting to run on the line,

(Testimony of George Olaf Flagstad.)

and I should judge she was blowing at between 60 and 70.

Mr. Morse: 60 or 70 miles an hour?

The Witness: Yes, sir. [183]

Q. (By Mr. McKeon): Bearing that in mind, Captain, and going back to the time the Herald was at anchor with one anchor down, do you think if she had remained there at anchor with one anchor down that she would have been able to weather that blow?

A. Pretty hard to tell, but I have my doubts.

The Court: You expect to go back to Seattle tonight?

The Witness: Yes, sir.

The Court: Got reservations?

The Witness: Not yet. I wasn't sure, so I didn't.

The Court: Bring your tug down with you?

The Witness: No, going by plane.

The Court: Every one of these sailors, it seems everybody goes by plane now.

The Witness: Well, they want us down in a hurry and they hurried it up.

The Court: Well, we will hurry you back. That is all from this witness?

Mr. McKeon: No, your Honor.

Q. Captain, assuming you had the Herald of the Morning in tow south of the Columbia River?

A. Yes.

Q. And 25 or 30 miles offshore with a wind force varying from 8 to 10, or a strong gale blow-

(Testimony of George Olaf Flagstad.)

ing, would you have attempted to take that tow over the Columbia River bar?

A. No, sir. [184]

Q. It would not have been good judgment to have tried it, would it? A. No.

Q. The best thing to do is to head out to sea under those circumstances?

A. Yes, that is what I would have done.

Mr. McKeon: I think that is all.

Cross-Examination

By Mr. Morse:

Q. Captain, do you keep a log on the Hercules?

A. Yes, sir.

Q. Do you have it here?

Mr. McKeon: Might I say in that connection, Mr. Morse, it is a carbon copy of the original, I am informed.

The Witness: That is the original copy.

Mr. McKeon: Well, I have asked these gentlemen to search. The head of the tugboat company denied——

The Court: How do you know if that is the original?

The Witness: That is my writing on there.

Mr. McKeon: I want to inform the Court, if I may, of the fact that I do not have the original of which this is a carbon copy. I have strenuously tried to get it.

The Court: Subject to correction or further search, why, let it go in for what it is worth at this time.

(Testimony of George Olaf Flagstad.)

Mr. Morse: I am willing to accept this in lieu of the original. [185]

The Court: Let it be admitted and marked.

Mr. Morse: This is five sheets. We ask it to be marked as one exhibit.

The Clerk: For identification?

Mr. Morse: For identification.

The Clerk: Respondent's Exhibit B.

(Whereupon the log above referred to was marked Respondent's Exhibit B for identification.)

Q. (By Mr. Morse): Captain, did you note in your log the wind force and position from time to time?

A. No, sir, I didn't write by a scale. We had it "easterly" or from whatever direction it come from.

Q. After you got outside of Cape Hatteras coming down the coast, what——

The Witness: Cape Flattery.

Q. I am sorry. I am 'way afield. Flattery. What was your wind and force?

A. South and southeast, increasing. It wasn't blowing so very hard.

Q. And it was moderate coming down the coast?

A. Yes, sir.

Q. And when you got to the vicinity of the Herald of the Morning, you remained in the vicinity until daylight?

A. Well, I got in front of Grays Harbor and

(Testimony of George Olaf Flagstad.)

she was what I call a kind of a moderate to fresh southeast. Then we didn't [186] pay much attention to the weather.

Q. It didn't bother you very much?

A. No—well, bothered us so we got wet if you go outside and run around, but we never pay no attention to that.

Q. You didn't try to put your line aboard the Herald until the morning of the 18th?

A. That's right, sir.

Q. Is it a fair statement to say that at that time the weather was still moderate? A. Yes.

Q. That during that day around noontime of that day you started up north towing the Herald of the Morning?

A. About 10:00, 10:30, somewhere around there, I think it was.

Q. Proceeded up——

A. But she was breezing up as soon as daylight came, she started, the wind started to breeze up again.

Q. What would you say is a fair statement of the wind force from the time you say you started your trip up there?

A. Put the wire on, you mean?

Q. Yes. A. I should judge about 30.

Q. Thirty miles an hour?

A. Yes, thirty, maybe 35.

Q. What would that be on the Beaufort scale?

A. 5 or 6, I guess. Of course, I wouldn't say for

(Testimony of George Olaf Flagstad.)

sure, I am [187] just guessing. I have no way of measuring it.

Q. What was the maximum wind velocity from the time you left the anchorage until you got inside Cape Flattery? A. On the return trip?

Q. Yes, sir.

A. I suppose—I don't know—between 60 and 70, and the scale, I don't know—that would be about 12, I suppose.

Q. You think it got up——

A. 11 or 12, somewhere around there.

Q. You think it got up to a wind force of 11 or 12, Captain?

The Court: He doesn't know, he says.

Mr. McKeon: He didn't know, 11 or 12, I guess that is about 11 or 12.

Mr. Morse: Yes.

The Court: Measure it in miles. I will be able to compare it better that way.

Mr. McKeon: On the tugboats, your Honor, they talk in miles an hour, not the native lingo.

The Court: About how many miles per hour?

The Witness: The Coast Guard wired up off Destruction Island, said it was blowing 65 miles an hour.

Mr. Morse: We have the depositions of the Coast Guard to verify that statement.

The Witness: Yes, sir. You see, we got it over the radio from the Coast Guard, because we slowed down—— [188]

(Testimony of George Olaf Flagstad.)

The Court: Gets it from the radio, from the Coast Guard, he said.

Q. (By Mr. Morse): Captain, is November a month when you might normally expect storms in that area?

A. Well, almost any month. It seems, of course, they come when you least expect them.

Q. It is——

A. November is not a very good month, no.

Q. As I recall, you said when you came up to the Herald at anchor she was from 10 or 12 miles offshore?

A. Yes, that is what I figured she was. I didn't take any bearings to verify it, or anything, but I figured——

Q. That is your approximation? A. Yes.

Mr. Morse: I have no further questions.

Redirect Examination

By Mr. McKeon:

Q. Captain, in maneuvering around in water such as you were, there is always present the danger of the line fouling?

A. Oh, always is in a case like that.

Q. Have to guard against that to the best of your ability, too? A. Yes, sir.

Mr. McKeon: I think that is all.

The Court: Do you supervise the other two? Are they flying with you, too? [189]

The Witness: Pardon me?

The Court: Are they going back to Seattle?

(Testimony of George Olaf Flagstad.)

The Witness: We all flew down together, the two of them and myself.

The Court: You are supervising the group?

The Witness: No, we are all together.

The Court: Step down.

The Witness: Thank you.

VERNOL M. CRAIG

called as a witness on behalf of the libelants; sworn.

The Court: Your full name, please?

A. Vernol Marvin Craig.

Q. What is your business or occupation?

A. Towboat business, sir.

Q. And in what capacity?

A. I'm master of one of the tugs of the Puget Sound Tug & Barge Company.

Q. How long have you been a master of tugs?

A. That particular tug, five years.

Direct Examination

By Mr. McKeon:

Q. And you have had considerable Navy experience, have you not?

A. Yes, sir, since 1924.

Q. Any tugboat experience in the Navy? [190]

A. Since 1936.

Q. And you were the mate on the Hercules at the time you went and picked up the Herald of the Morning and towed her in?

A. Yes, sir.

(Testimony of Vernol M. Craig.)

Q. You have heard your captain's testimony, did you, as he related it on the stand?

A. Yes, sir.

Q. Will you tell us after your arrival in the vicinity of the Herald of the Morning and the Sea Fox just what you did, what your tug went through and what your experience was?

The Court: Approximately what time did you reach there?

The Witness: Approximately 3:15 in the morning of the 18th.

The Court: What did you see at that time and what happened?

The Witness: There were—the ship was anchored with one anchor. The Sea Fox had a manila hawser aboard her and was pulling slowly. There was a swell running, a slight breeze. We intended to give the ship our wire upon our arrival, but were requested to wait until daylight, due to the fact that they had no lights aboard ship, it was hazardous for the men to work in the darkness.

At daylight, approximately around 8:00 o'clock we made our first attempt on the weather side to get our wire aboard. Two attempts were made and failed to do it, due to the condition [191] of the sea and the proximity of the ship's anchor chain and the manila hawser from the Sea Fox. We had to change our tactics and go around to the lee side, or starboard side. The attempt to get our wire up was finally successful, but we had asked them to take our pennants from the wire after they had it aboard

(Testimony of Vernol M. Craig.)

and make some figure eights around their bitts on deck and then lash the wire so that it would not slip, but instead of doing that, the wire in the end of the pennant was shackled into a pad eye near the bow of the ship.

Upon the crew on board passing the word down that the wire was secured, the mate also stated to take it easy, that the wire was just shackled into a pad eye on deck.

Our men at times during the operation of getting our tow line aboard, were working in water which had come over the stern of the boat. One man was nearly washed overboard.

I believe that is all I can relate right now.

The Court: What followed?

The Witness: Upon being notified that our wire was secure, we asked the ship to let go their anchor chain. They endeavored to do so, but could not due to the fact the——

Mr. Morse: That was their port anchor, Captain?

The Witness: Port anchor is right, yes. Their chain was jammed, the bitter end, in the chain locker. Consequently they had to ask the Coast Guard cutter Balsam for an acetylene cutting equipment. It was approximately an hour from the [192] time our wire was fast until the anchor chain was finally let go and we proceeded on.

During the course of the day on the way back towards Seattle, the wind kept increasing along with the seas and approximately off Destruction Island we had to slow our speed to relieve the

(Testimony of Vernol M. Craig.)

strain on the wire. In the meantime, the ship was shearing from side to side and the rudder of the ship was lashed over hard left, which would make the ship ride off to one side a great deal. Along about evening we received word from the Coast Guard Balsam that the wind was blowing 65 miles an hour. Upon rounding Cape Flattery and entering the Straits of Juan de Fuca, the weather began to moderate.

The Court: That would be the 18th?

The Witness: That would be the 19th.

Q. (By Mr. McKeon): Tell us what time you got in and put that ship alongside. If you wish to refresh your recollection from the log, you may.

A. May I have the question again, please.

Q. What time did you put the vessel in safety at Everett on the night of the 19th?

A. 9:45 the ship was tied up in the dock.

Q. At 9:45 that night? A. That night.

Q. The 19th? A. The 19th. [193]

Q. You left Seattle shortly after midnight on the 17th? A. 1:40.

Q. And arrived at the scene on the 18th?

A. The morning of the 18th, 3:15.

Q. And then got back into Everett at 9:45?

A. And the ship was tied up at 9:45.

Q. And then you left there and went to Seattle?

A. Went to Seattle.

Q. When did you arrive at Seattle?

A. Arrived at Seattle at 1:00 o'clock in the morning of the 20th.

Q. While you were maneuvering to get your lines

(Testimony of Vernol M. Craig.)

aboard—strike that. After you got your lines aboard the Herald and the Sea Fox had the manila line holding on to the Herald, did your tug get in irons?

A. Yes, we did.

The Court: Your tug get what?

Mr. McKeon: In irons.

The Court: Yes.

Q. (By Mr. McKeon): And what was the effect of that fact on your tug?

A. Well, we were unable to control or bring her up into the wind at all.

Q. And was the Sea Fox in the same predicament?

A. The Sea Fox was in the same predicament and laying on our [194] port side, yes, sir.

Q. Now, did that create a danger of accident between your two tugs? A. Yes, it did.

Q. Did the presence of the anchor, the port anchor of the Herald and the towing hawser from the Sea Fox to the Herald in any wise increase the hazard to you in attempting to get a line aboard the Herald on the morning you attempted to do so?

A. Yes, it created quite a hazard due to the fact that you had to limit your space of maneuvering. you couldn't go around about close to the ship, you had to go around the stern and come into the ship with the anchor chain and the Sea Fox with his towing line out, had to stay clear of that. The Sea Fox was laying a little bit to the port. Consequently that cut off a great deal of maneuvering space.

Q. Yes. With the acetylene torch sent over from the Balsam, they cut that port anchor chain, that

(Testimony of Vernol M. Craig.)

is, the men on the *Herald* cut the port anchor chain?

A. That is right, yes, sir.

Q. And that permitted the port anchor to remain down at the bottom? A. Yes, sir.

Q. And did they cut that chain high up near the chock, or well down?

A. The chain was cut somewhere on deck. We couldn't observe [195] where it was.

Q. Then that let it run up? A. Yes.

Mr. McKeon: I think that is all.

Cross-Examination

By Mr. Morse:

Q. Captain, when the *Herald* of the Morning was adrift and had you come up at that time, would you have asked the *Herald* of the Morning to let go its port anchor so that you could put a wire to the port anchor chain; she would then not have any anchor at all?

A. I wouldn't have asked them to use their remaining anchor, no. I would have asked if they had any chain available.

Q. I understand. Other than the——

A. The full anchor and chain, yes.

Q. So it is clear in my mind, it was kind of necessary that they keep their one anchor and chain available in case they did drift into shore?

A. Yes.

Q. Now, Captain, you said that the rudder of the *Herald* appeared to be lashed hard left?

A. That's right, yes.

Q. Did you go aboard to ascertain if it was

(Testimony of Vernol M. Craig.)

lashed hard left? A. Pardon?

Q. Did you go aboard at any time to ascertain if it was lashed hard left? [196]

A. No, I did not. I was just merely taking some statements of others that upon our arrival in Everett we lashed up alongside the ship and were trying to compensate with the ship; we were unable to steer it due to the fact that the rudder was hard left. I—we notified the pilot to that effect and he took different measures.

Q. When you first started off from the anchorage, was the rudder in hard left position?

A. Yes.

Q. Did you communicate with the Herald of the Morning about that fact? A. No, we didn't.

Q. How many hours prior to the time when the Herald of the Morning was made secure at the dock in Everett had the weather moderated? In other words, as soon as you got in the Straits of Juan de Fuca the weather moderated materially, didn't it?

A. It moderated, yes. We still had considerable swell until we were down near the port of Los Angeles.

Q. What wind force would you say, Captain, was there when you were outside?

Mr. McKeon: You mean with the tow?

A. Which time?

Q. (By Mr. Morse): When you and the Sea Fox were towing.

A. The maximum wind, I would say, between 60 and 70 miles an hour. [197]

(Testimony of Vernol M. Craig.)

Q. What would that be on the wind scale, Beaufort? A. 10 or 11.

Q. That is your best estimate?

A. Possibly more. That is guesswork on the Beaufort scale.

Q. What was the wind force at the time you were putting your line to the Herald of the Morning? A. I would say between 30 and 40.

Q. And what would that be on the Beaufort scale? A. About 6.

Q. 30 to 40. How would you describe it in descriptive words comparable to the Beaufort scale? You also use a light breeze, or heavy gale, something of that sort. How would you describe that?

A. A heavy gale.

Q. On the morning when you were making your line secure? A. Yes.

Q. It was a heavy gale at that time?

A. The wind was blowing up to a heavy gale, yes.

Q. During the time that you were putting your line aboard, what was the wind?

A. During the time the wind was blowing 30 miles an hour, I would say.

Q. You don't care to describe it in any other nautical phrase?

A. Well, if you want the force, I would say force 5. [198]

Q. From which bow of the Herald did the twelve inch hawser—— A. Starboard bow.

(Testimony of Vernel M. Craig.)

Q. So that you had originally intended to have your wire lead from the port bow?

A. That is right.

Q. And the Sea Fox, when the Herald was at anchor, the Sea Fox, was somewhat off the port bow, wasn't she? A. Yes.

Q. Ultimately did the wire and the hawser lead through the same chock? A. Yes.

Q. Both from the lead bow, weren't they?

A. From the starboard.

Q. That was the lead bow, wasn't it?

A. Yes.

Q. Maneuvering tugs is rather hazardous at all times, isn't it, Captain, in the vicinity of large ships? A. Yes.

Q. Did you take any green water aboard while you were maneuvering, putting your line aboard?

A. We did on the weather side or port side of the vessel; we took green water aboard.

Mr. Morse: No further questions.

Mr. McKeon: That is all, Captain. [199]

Mr. McKeon: While Mr. Sprague is here, if I may address him where he is sitting, your Honor——

Q. Captain, did you notice the condition of the rudder of the Herald at any time?

A. No, I did not.

The Court: What is that?

Mr. McKeon: He did not notice the condition of the rudder on the Herald at any time.

The Court: Oh.

(Testimony of Vernol M. Craig.)

Q. (By Mr. McKeon): Secondly, Captain Sprague, please tell us whether or not you were led to believe by your conversation with the Herald whether she had any available anchor.

A. No, I assumed from what she told me they had no anchor chain aboard the ship at all.

Q. (By Mr. McKeon): How about the anchor? She had no anchor chain and she had no anchor?

A. I saw the anchor.

Q. You saw the anchor?

A. From what you told me, I assumed that they had no chain aboard.

Mr. McKeon: That is all.

The Court: Any further questions?

Mr. Morse: No.

The Court: Does that take care of all your witnesses from Seattle and way points? [200]

Mr. McKeon: Pardon me?

The Court: Does that take care of all your witnesses?

Mr. McKeon: That is all the Seattle witnesses, your Honor.

The Court: They are all anxious to get home to their families.

Mr. McKeon: May I ask Captain Flagstad about the rudder?

Q. Did you notice the condition of the rudder of the Herald, the position of it?

Captain Flagstad: No, I did not. I noticed she was shearing to port all the time.

Mr. McKeon: Well, when you got into Everett,

(Testimony of Vernel M. Craig.)

did you have a look to see whether or not that rudder was hard over?

Captain Flagstad: I thought something was funny. That is the reason I asked Craig if he couldn't stay alongside her and make headway on her.

Q. (By Mr. McKeon): Did you look at the rudder after you got her into the dock?

Captain Flagstad: No, glad to get away from it all.

Mr. Morse: I think the only evidence in the record so far is the testimony——

The Court: Glad to get away from it all.

Mr. Morse: ——is the fact the testimony, one witness said that when he saw her at anchor the rudder was weaving back and forth. [201]

Mr. McKeon: Yes, I think it got loose somewhere in this weather.

The Court: Is that all?

Mr. McKeon: Your Honor has been very considerate of us and of the witnesses.

The Court: How many witnesses do you expect to have?

Mr. McKeon: Two, your Honor.

The Court: Tomorrow we have about five or six judgments and settlement of findings. If it goes over to 2:00, will that be sufficient time?

Mr. Morse: Do the best we can.

The Court: Better go over to Monday then, if you wish.

(Testimony of Vernol M. Craig.)

Mr. McKeon: I think we better try to finish tomorrow.

Mr. Morse: I prefer to start tomorrow at 2:00.

The Court: Very well. 2:00 o'clock.

Mr. McKeon: And let us try to finish it.

Mr. Morse: Have you concluded your case?

Mr. McKeon: No, I will conclude in the morning.

The Clerk: 2:00 o'clock tomorrow afternoon.

(Thereupon an adjournment was taken to tomorrow, Friday, January 19, 1951, at 2:00 o'clock p.m.) [202]

Monday, January 22, 1951, at 10 o'Clock A.M.

The Clerk: Puget Sound Tug & Barge Company, v. Waterman Steamship Corporation and similar case on trial.

Mr. McKeon: Ready.

Mr. Morse: Ready.

At your request, Mr. McKeon, I am handing you the insurance policy on the Herald of the Morning on the voyage in question. Now, we don't think it has anything to do with this case at all.

Mr. McKeon: If the Court please, I have urged that the respondent in this matter, pursuant to an arrangement between all parties, an arrangement to have the insurance on this vessel, the Herald of the Morning, during this voyage, or during the period of the towage, inure to the benefit of the tug and that the ship owners actually paid an additional premium to the underwriters for that ad-

(Testimony of Vernel M. Craig.)

ditional protection. Mr. Morse has been contending otherwise and in that connection I wish to introduce the policy of insurance and an exchange of telegrams between certain of the parties relating to the insurance and the cost of the insurance.

The policy would take the libelant's next exhibit number, and I assume that these telegrams can go in.

Mr. Morse: No objection at all.

Mr. McKeon: And there are several telegrams, two, three [203] four, five, six, telegrams relating to this matter of, in part relating to this matter of insurance, from which I will contend, your Honor, that this tug towing the Herald in the morning was protected by this hull policy of insurance for which the owner paid an additional premium.

The telegrams are dated October 27—these are all 1948, your Honor—signed by Mr. Williams of the Maritime Commission; a telegram of October 28 from Waterman Steamship Corporation to Mr. Williams, the secretary of the Maritime Commission, Waterman being the owner of the vessel; a telegram of October 28, 1948, from Waterman Steamship Corporation to Pacific Car Foundry Co., the Everett Shipbuilding and Drydock Company that was doing the work on the ship, and whose yard the vessel was being towed; a telegram of October 28, 1948, to Waterman from Mr. LeBlanc, the general manager of the Everett Shipyard; a telegram of October 29 from Mr. Williams of the Maritime Commission to Waterman Steamship Corporation; and the telegram of October 29 to this Everett Ship-

(Testimony of Vernol M. Craig.)

yard, Mr. LeBlanc, sent by Sudden & Christenson, Demarest, Sudden & Christenson, Incorporated. I will ask that that group take one exhibit number.

The Court: They may be admitted and marked.

The Clerk: Libelant's Exhibits 5 and 6 admitted and filed in evidence.

LIBELANT'S EXHIBIT No. 6

(Copy)

BMA056 Long GOVT PD WUX Birmingham Ala
27 1201 P

1948 Oct 27 PM 12 51

Waterman Steamship Corp
Mobile

Commission by action of October 26, 1948, approved as allowances to be made against published sales price, on transfer of title for use Herald of the Morning to your company (1) \$60,606 for dry-docking and condition survey: (2) \$35,000 for naval architect's fee. (3) Pacific Car and Foundry Company's part B bid dated September 22, 1948, submitted in response to invitation TDR-218 in the amount of \$596,074 for reconversion. (4) Expenses incident thereto estimated at \$25,184 provided you agree to the following. (A) To award the work to Pacific Car and Foundry Company D/B/A Everett Pacific Shipbuilding and Drydock Company in accordance with their part B bid. (B) To permit inspection of the reconversion and drydock work under (A) by the Commission's representatives. (C)

Libelant's Exhibit No. 6—(Continued)

Confirmation is obtained from hull and machinery underwriters that Pacific Car and Foundry is named as co-insured during transfer of vessel and coverage is obtained prior to movement. (D) To submit within six (6) months proper evidence that the expenditures covering work for allowances have been made for that purpose and that accounts and records of your company and shipyard performing work shall be available for audit as required by the Commission. (D) That in the event the amount expended for work for which allowances 1, 3 and 4 are made is less than amount of allowance set forth herein your company will pay to Commission an amount equal to the difference.

Please notify Commission of acceptance of allowances and all conditions. After proper acceptance has been received title for vessel will be transferred to you at which time you may proceed with work.

A. J. WILLIAMS,
USMC, Washington.

copied for
Mr. Roberts
Mr. Garner
Mr. Slaton
Mr. Waller
Mr. Murray
Capt. Reed
Mr. Ingram
Mr. Foster
Mr. Stoudenmire

[Stamped]: G. F. Oct. 28, 1948.

Libelant's Exhibit No. 6—(Continued)

October 28, 1948

Mr. A. J. Williams, Secretary,
United States Maritime Commission,
Washington, D. C.

Retel October 27th we accept your proposal for purchase of SS Herald of the Morning and agree to all terms and conditions as set out in your telegram. Vessel now located San Francisco and it is our understanding that necessary for contractor to make all arrangements for towing vessel to Everett and assume all expense in connection with preparation and towing vessel to their plant. It is our understanding that it is necessary for us to cover insurance for your account with understanding that Pacific Car & Foundry Company is named as co-insurer during the transfer of vessel and coverage is obtained prior to movement.

WATERMAN STEAMSHIP
CORPORATION.

NN/L

Chg. Waterman SS Corp.

Time—10:30 A.M.

cc to

Mr. Roberts, Mr. Garner, Mr. Slaton, Mr. Waller,
Mr. Murray, Capt. Reed, Mr. Ingram, Mr. Foster,
Mr. Stoudenmire.

Libelant's Exhibit No. 6—(Continued)

October 28, 1948.

Pacific Car & Foundry Co.,
Everett-Pacific Shipbuilding & Drydock Co.,
Everett, Washington.

You are hereby awarded contract to repair SS Herald of the Morning in accordance with your bid part "B" dated September 22, 1948, submitted in response to invitation TDR-218 in the amount of \$596,074.00 for reconversion with understanding that you permit inspection of reconversion drydock work under "A" by Commission's representative and that you permit the Maritime Commission to audit your books as they may require. You are authorized to immediately take delivery of the vessel at San Francisco, California, and tow her at your expense to your plant it being understood that all expense involved in preparing vessel for tow be for your account and all towage arrangements must be approved by the United States Salvage Association surveyors and our representatives. Time to commence at 8:00 a.m., November 1st, 1948. Please telegraph your acceptance.

WATERMAN STEAMSHIP
CORPORATION.

CC to

Messrs. Roberts, Garner, Slaton, Waller, Murray,
Ingram, Foster, Stoudenmire, Capt. Reed.

NN/L

Chg. Waterman SS Corp.

Time—10:30 A.M.

Libelant's Exhibit No. 6—(Continued)

(Copy of telegram)

October 28, 1948.

Waterman Steamship Corporation,
Merchants National Bank Building,
Mobile, Alabama.

Reurtel today we accept award contract recon-
vert Herald of the Morning in accordance our bid
part "B" dated 22 September, 1948, in amount
\$596,074.00 in response invitation TDR-208 with
understanding Commission's representative will be
permitted inspect reconversion drydock work under
part "A" of item 105 of specifications and Maritime
Commission may audit books in accordance Article
36 of pro forma contract it is understood official
starting time is 8:00 a.m., November 1, 1948, that
we are authorized to immediately take delivery of
vessel, that expense of preparing for tug and tow-
ing for our account except insurance which for
your account and that towing arrangements must
be approved U.S. Salvage Association Surveyors
and your representatives.

R. LeBLANC,
General Manager, Everett-Pacific Shipbuilding &
Drydock, Everett, Washington.

Originals: Capt. Nicolson.

Copied for: Mr. Roberts, Mr. Garner, Mr. Slaton,
Mr. Waller, Mr. Murray, Capt. Reed, Mr. Ingram,
Mr. Foster, Mr. Stoudenmire.

Libelant's Exhibit No. 6—(Continued)

(Copy)

Western Union

1948 Oct 29 PM 6 21

AA83

A. BMB730 NLPD Govt WUX Birmingham Ala 29

Waterman Steamship Corp.,
Mobile, Ala.

Reurtel October 28 on purchase of USS Herald of the Morning your understanding that it is necessary for you to cover insurance during movement of vessel by Pacific Car and Foundry Company, who is to be named as co-insured, is correct. Allowance for your expenses will be revised to include insurance costs.

A. J. WILLIAMS,
USMC, Washington.

Copied for Mr. Waller

Mr. Foster

Mr. Hirs

Orig. to Capt. Nicolson

Western Union

(Copy)

WU 1 DL PD SFranerisco Calif Oct 29 (#\$A 1948
Robert LeBlanc—Everett Pacific Shipbuilding Co.

Herald of the Morning we agreeable act your agent in accepting this vessel Oakland prepare for tow and dispatch vessel toward your yard Everett

Libelant's Exhibit No. 6—(Continued)

Trust fee \$500.00 satisfactory. Understand your preference tow boat Company Foss Launch and Tug please accomplish lump sum towage agreement with Foss mail us two copies soonest this necessary satisfy salvage association and enable owner arrange towage risk insurance we believe standard form towage contract is with release of tug from any and all liability. Our port staff working closely with your George Simpson. We hopeful arrangements for crew under terms no less favorable than Young America Tow. We will also procure Coast Guard temporary certificate American Bureau of Sea Worthy Certificate and approval of salvage association of tug equipment and method of tow. Every effort will be made to dispatch from San Francisco noon November 5th will keep you advised—Demarest—Sudden and Christenson Inc.

[Endorsed]: Filed January 22, 1951.

Mr. McKeon: If the Court please, in answer to one of the interrogatories, Interrogatory 7 of the interrogatories [204] attached to the answer to the cross-libel, the question was: "Is it not a fact that a surveyor to the Board of Marine Underwriters of San Francisco and the United States Salvage Association, for and on behalf of the underwriters of the Herald of the Morning, passed up and approved as satisfactory the tug and tow for the voyage mentioned?"

The answer to that is, "Yes, but only as provided in said survey report."

To complete that answer I now want to introduce in evidence the survey report referred to.

Mr. Morse: No objection. We were going to offer it ourselves.

The Court: It may be admitted and marked.

The Clerk: Libelant's Exhibit 7 admitted and filed in evidence.

(Whereupon the document above referred to was received in evidence and marked Libelant's Exhibit No. 7.)

LIBELANT'S EXHIBIT No. 7

United States Salvage Association, Inc.

Head Office

99 John Street

New York

Case No. C-5477

Agency at: San Francisco, Calif.

November 4, 1948.

Fitness to proceed as flat tow from Oakland,
California, to Everett, Washington.

November 4, 1948

S.S. "Herald of the Morning"

Please Read Conditions

The services of this Association are offered and this report or certificate is issued on the following conditions:

(1) That while the officers and the Board of Directors of the United States Salvage Association, Inc., have used their best endeavors to select competent surveyors and to insure that the functions of the association are properly executed, neither the officers nor the Directors nor the Association are under any circumstances whatever to be held responsible for any error of judgment, default, or negligence of any surveyor or other employee or representative of the Association, or for any inaccuracy, omission, misrepresentation or misstatement in any report or certificate.

(2) That under no circumstances shall this report or certificate be used in connection with the issuance, purchase, sale or pledge of any security or securities, or in connection with the purchase, sale, mortgage, pledge, freighting, letting, hiring or charter of any vessel, cargo, or other property.

The terms of these conditions can be varied only by specific resolution of the Board of Directors, and the use of this report or certificate shall be construed to be an acceptance of the foregoing conditions.

Report of survey made by the undersigned surveyor of the United States Salvage Association, Inc., on November 3, 1948, at the request of the United States Salvage Association, Inc., New York, N. Y., and Sudden and Christenson on the S.S. "Herald of the Morning," C-2 type vessel, formerly a Navy transport and now owned by the Waterman Steamship Company, while lying afloat at

Moore's West Yard, Oakland, California, in order to ascertain and report on the fitness of the vessel to proceed as a flat tow from Oakland, California, to Everett, Washington.

Attending Survey:

Mr. Simpson representing Everett Pacific Shipyard.

Mr. Randall representing Sudden and Christenson.

The vessel's tanks are all empty, and manhole covers bolted down.

Weather hatches and tarpaulins are in place and locking bars secured.

All watertight doors in weather deck are closed and dogged.

Cargo booms are nested in the rests and strapped or lashed.

Starboard anchor was removed for towing on starboard cable and anchor secured to steel deck with welded bands and wire lashing.

Windlass brakes are operative but no power on windlass.

Rudder is secured amidships.

The vessel's draft is 8'6" forward and 17'00" aft. Propeller and tailshaft are in place and rigidly secured to framing to keep from turning.

Stern gland was taken up on and does not leak.

Watertight door to shaft alley is closed and dogged.

Ship's side valves are closed tight and hand wheels removed.

Condensers, circulating pumps, evaporators are closed up tight. There is no machinery in engine

room opened up, with the exception of boiler fronts being off. These were all lashed down to keep from moving around.

There is no loose gear in 'tween decks to move around.

Doors to storerooms and quarters were closed and secured except those in use.

Bilges are dry.

An air compressor was placed on deck with air hoses to general service and fire pumps.

CO₂ portable fire extinguishers, tested and certified, October, 1948, are located in troop quarters in 'tween decks.

Chemical fire extinguishers—six (6) off—2½ gallons placed on board handy for the crew.

Navigating kerosene lights were placed aboard, and a supply of flash lights, batteries and bulbs.

There was no litter or oil noted which would constitute a fire hazard.

Crew consists of master, 2 mates, 6 A.B. seamen, 2 engineers, cook and messman.

The towing tug is the "Sea Fox," of the Red Stack Tugboat Co. which previously towed the S.S. "Young America" from Oakland, California, to Everett, Washington.

In the opinion of the undersigned, both tug and tow are fit to proceed on the contemplated voyage, taking advantage as much as possible of favorable weather.

/s/ MURDOCH MURRAY,
Surveyor.

[Endorsed]: Filed January 22, 1951.

Mr. McKeon: I assume, Mr. Morse, it will be stipulated that the Everett Pacific Shipbuilding and Drydock Company, sometimes called Pacific Car & Foundry Company, had contracted to make these repairs to the Herald of the Morning?

Mr. Morse: Yes, and in order to have the whole plan complete, I was going to suggest we offer the contracts, the contract with Everett Pacific, the contract for the purchase of the vessel, and the lump sum towage agreement. [205]

Mr. McKeon: Very good.

Mr. Morse: Then we would have in evidence all of the documents of record. If you wish I will put them in as my exhibits.

Mr. McKeon: All right. It doesn't make any difference.

Mr. Morse: Offer in evidence as Respondent's exhibit next in order contract number MCC 61,004, which is a contract for purchase of a vessel between Waterman and the Maritime Commission.

The Court: It may be admitted and marked.

The Clerk: Respondent's Exhibit C admitted and marked in evidence.

(Whereupon the document above referred to, was received in evidence and marked Respondent's Exhibit C.)

Mr. Morse: I offer in evidence Contract MCC 61,461, which is the contract between three parties there named, the Maritime Commission, Everett Pacific and Waterman Steamship Corporation. This is for the reconversion of the vessel.

The Clerk: Respondent's Exhibit D admitted and filed in evidence.

(Whereupon the document above referred to was received in evidence and marked Respondent's Exhibit D.)

Mr. Morse: A copy of the lump sum towage agreement, which was executed between the ship-owners and merchants and Everett Pacific, dated November 1, 1948. [206]

The Clerk: Respondent's Exhibit E admitted and filed in evidence.

(Whereupon the lump sum towage agreement above referred to was received in evidence and marked Respondent's Exhibit E.)

RESPONDENT'S EXHIBIT E

(Copy)

Lump Sum Towage Agreement

It is hereby agreed between Shipowners & Merchants Towboat Co., Ltd., hereinafter called First Party, and Everett Pacific Shipbuilding & Drydock Co., as owners of the SS "Herald of the Morning," or agents for owners, hereinafter called Second Party, as follows:

1. First Party agrees to furnish the tug "Sea Prince" or "Sea Fox" and use its best efforts to tow the SS "Herald of the Morning" from San Francisco Bay to Everett Bay, Washington. Said towage shall commence about 10 days from the date hereof.

2. First Party shall be paid \$5,750.00, Five Thousand Seven Hundred and Fifty 00/100 dollars plus tax for its service and such sum shall be deemed earned by First Party and payable by Second Party in full upon commencement of towage service even though at any stage of the venture thereafter the towage service be cancelled by Second Party or the tow or tug be lost or disabled or the tow break away or become unfit to continue to destination. An additional \$750.00 per calendar day per tug shall be paid by Second Party for any delay to tug in its performance of the towage service after the tug's arrival ready to commence, whether such delay occurs prior to or after commencement of the towage service, excluding, however, any delay caused by fault or act of First Party or caused by weather conditions after commencement of the towage service. If, after the tug's departure from San Francisco and before commencement of the towage service, such service is cancelled by Second party or is prevented by any other cause beyond First Party's control First Party shall be paid at the rate of \$750.00 per calendar day or fraction thereof per tug from the date of such departure until the time of her return to said port. Payment to First Party of the amounts due it hereunder shall be made in ten days.

3. Second Party shall make up tow and cause it to be in all respects sufficient and fit to make the voyage and withstand the perils to be encountered. First Party shall not be required to make any inspection of tow before commencing the towage serv-

ice. Second Party shall direct and be responsible for the method and position in which tow shall be towed and the determination of time of sailing and shall man, supply and maintain thereon proper navigation lights and towing gear and make tow lines fast thereon and moor or secure tow upon arrival at destination.

4. First Party shall be relieved of any obligation to perform hereunder if prevented or delayed from so doing by strikes, lockouts, or labor disturbances or the loss of or damage to the named tug, and First Party shall not be responsible for loss or damage arising from faults or errors in the navigation or management of tug or tow.

5. The tug may at any time mentioned herein go to the assistance of vessels in distress for the purpose of saving life or property, and in connection therewith call at any port of distress for fuel, supplies, or other necessities, or to land disabled seamen, and time lost by the tug under such circumstances shall not be deducted from the sum payable hereunder, the tow, however, to be left in a position of safety and upon the completion of said assistance, the tug shall return to the tow and resume the towage service.

6. All port charges, assisting towage, and any wharfage chargeable against the tow shall be paid by Second Party.

7. Second Party shall indemnify and hold harmless first Party and said tug against liability to and

claims and demands of the personnel of Second Party aboard the tow or their heirs or personal representatives.

8. By endorsement thereon or otherwise and without any right or subrogation against it, First Party shall be made an additional assured in Second Party's insurance policies covering the tow, including Hull, P. & I. and Cargo, during the towage service, and, if Second Party does not so add First Party as an additional assured or fails to provide for the aforesaid waiver of subrogation or fails to insure said tow, then Second Party agrees to be the insurer thereof for both parties and expressly agrees to assume the risk of loss of or damage to the tow and cargo and any liability of First Party therefor which could be covered by usual and suitable forms of marine insurance policies.

9. This shall not be deemed to be a personal contract of a kind which would preclude First Party of the benefit of the limitation of liability statutes of the United States and nothing herein contained shall be deemed a waiver thereof.

In Witness Whereof, the parties hereto have caused these presents to be executed by their proper representatives thereunto duly authorized this 1st day of November, 1948.

SHIPOWNERS & MERCHANTS TOWBOAT
CO., LTD.

By /s/ THOMAS B. CROWLEY,
Vice President.

EVERETT PACIFIC SHIPBUILDING & DRY-
DOCK CO. SUDDEN & CHRISTENSON,
INC.,

Agts.

By /s/ R. O. DEMAREST.

[Endorsed]: Filed January 22, 1951.

Mr. McKeon: We rest, your Honor.

Mr. Morse: I will call Captain Sommer, please.

RUDOLPH T. SOMMER

called as a witness on behalf of the Respondents,
heretofore sworn.

The Court: State your full name, please.

A. Rudolph T. Sommer.

The Clerk: Rudolph T. Sommer, heretofore
sworn.

Direct Examination

By Mr. Morse:

Q. Captain Sommer, will you please refer to your log, which is Respondents' Exhibit A for identification. Would you give us the positions of your tug on each of the days after departure from San Francisco?

Mr. McKeon: Well, if they are in the log why not just read them?

Mr. Morse: As we go along from each day, if they are in the log, say so, and if they are in the

(Testimony of Rudolph T. Sommer.)

log I would like to know whether it is a sighted position or whether a dead reckoning position.

A. Dead reckoning. Well, it will be on the 5th, Point [207] Reyes, starting from Point Reyes?

Q. (By Mr. Morse): Yes, sir.

A. Three miles distant, that would be dead reckoning, three miles off.

Q. Yes. A. That was at 5:45 p.m.

Q. You don't need to give the position, just give the date and indicate whether it is dead reckoning or whether a sighted position. A. Yes, sir.

Mr. McKeon: Mr. Morse, we would get along much faster if you would read it.

The Court: If you are familiar with it you might read it into the record.

Mr. Morse: I am not familiar with it, I haven't seen it until it was produced in court.

Mr. McKeon: It is my understanding that the witness has said it is all dead reckoning.

The Witness: Here's a position on the 7th, thirty-eight twenty north, one twenty-three fifty-nine west, that is a new position.

Q. (By Mr. Morse): Is that a sighting, a sighted position? A. Yes.

Q. Did you take a sight on the 7th?

A. Yes. Then on the 8th, it was a noon position, thirty-seven [208] fifty-one north, one twenty-three twenty-six west.

Q. And that is a sight? A. Yes.

The Court: Were they all sights?

The Witness: Some of them are and some of

(Testimony of Rudolph T. Sommer.)

them are not. Here is on the 9th, a noon position, forty-eight forty north, one twenty-three forty-two west.

Q. Again a sighted position?

A. That is a noon position.

Q. Sighted?

A. Yes, sighted. On the 10th, it is a noon position, forty twenty-five north, one twenty-four thirty-four west, a sight. And the 11th, it was forty-one twelve north, one two four fifty-four west. That is a sighted noon position. That is an approximate position.

Q. Now, that was a dead reckoning position?

A. Well, he has got "Prox." I guess it wasn't anything very clear. Approximate position.

The Court: Approximate position.

The Witness: On the 12th, a noon position, forty-one forty-seven north, one two four fifty-two west.

Q. (By Mr. Morse): Sighted?

A. That is a sight. On the 13th, noon position, forty-three forty north, one twenty-four forty-five west.

Q. Sighted, I assume? [209] A. Yes.

The Court: Getting into the storm, now.

The Witness: Yes, we are getting into the storm now.

The Court: The 14th?

Mr. Morse: We haven't the 13th, yet, Judge.

The Witness: Yes, we have had the 13th, you have the 13th.

Mr. Morse: I beg your pardon.

(Testimony of Rudolph T. Sommer.)

The Witness: Here is an approximate position on the 14th, forty-six zero zero north, one twenty-four thirty west.

Q. (By Mr. Morse): That would be dead reckoning?

A. Yes. On the 15th, noon position, forty-five fifty-seven north, one twenty-four twenty-five west. There was no position on the 16th.

Mr. Morse: We were at sea, too, Judge.

The Witness: On the 17th, forty-six forty-two north, one twenty-four twenty-six west. On the 18th, it is forty-six forty-two north, one twenty-four twenty-six west.

Q. (By Mr. Morse): Now, that would have been a sighted position?

A. Yes. On the 19th, forty-eight twelve north, one twenty-two fifty-two west.

Q. Did you personally take those sights, Captain?

A. No, sir, Mr. Reichel.

Q. Did you verify them yourself?

A. Yes, sir. [210]

Q. What did you do to verify them? Did you compute the position yourself?

A. No, I just verified them, checked them over with him.

Q. Did you personally——

A. We had the tables there and we went over it.

Q. Did you personally take sights of the sun to double check on him?

A. No, sir.

Q. Or did you compute his sights to see whether his computations were accurate?

A. No, sir.

(Testimony of Rudolph T. Sommer.)

Q. What watches did you stand when you were—— A. Eight to twelve, as a rule.

Q. You were on the eight to twelve watches, and who was on the twelve to four watch?

A. Twelve to four watch, I will take a look. Twelve to four was Harris, I am pretty sure.

Q. And Captain Reichel would be on the four to eight, then? A. Yes, sir.

Q. You three were the only three deck officers?

A. Yes, sir.

Q. On the 14th—correction. On the 13th when storm warnings were broadcasted, were you in sight of the coast? A. No, sir.

Q. Did you head to sea when you received those broadcasts [211] of storm warnings?

A. Yes, sir.

Q. At the time you received the storm warnings how far off shore were you?

A. Well, I couldn't say offhand, now.

Mr. McKeon: If the Court please, I don't like to interrupt, but all this was gone over on direct and cross before.

The Witness: I couldn't say, now, how far we were off.

Mr. McKeon: Unless the Court wants to hear some more, but I think in the interests of saving time, just going over it again.

Q. (By Mr. Morse): From the time you received the storm warnings, how far offshore was the maximum distance that you thereafter went?

A. Oh, maybe about thirty, forty miles, I should judge. I wouldn't say for sure.

(Testimony of Rudolph T. Sommer.)

Q. You went forty miles offshore?

Mr. McKeon: Thirty to forty.

The Witness: Twenty-five, thirty to forty.

The Court: Thirty to forty?

The Witness: Thirty to forty.

Q. (By Mr. Morse): That was your maximum offshore distance? A. Yes, sir.

Q. And when were you out that maximum offshore distance, which date? [212]

A. The storm come, the biggest storm, we were about thirty-five, forty miles off, I should judge.

Q. Well, the date, what was it when you were thirty-five, forty miles offshore?

A. When the wire parted.

Q. That would be on the early morning of the 16th?

A. Yes, sir, I should judge. I don't remember the date.

Q. Forty or fifty minutes after midnight?

A. Yes, sir.

Q. Does your tug have a listed or licensed radio operator aboard?

A. No, sir, doesn't require it.

Q. All radio-telephones, such as the one you had, does the Customs House require all radio-telephones, the radio communication system, compel you to file the name of your radio operator?

A. Yes, sir, I think so, I am not sure. I wouldn't say for sure; I am not sure.

Q. If you are not sure——

A. I am not sure.

(Testimony of Rudolph T. Sommer.)

Q. Be better not to say. Do you know the cycle on which your radio operates, the band?

A. Two three three oh, I think it is, I am not sure; thirty, forty, somewhere along in there; I am not sure.

Mr. Morse: No further questions. [213]

The Witness: The first mate generally took charge of the radio, I don't know.

Cross-Examination

By Mr. McKeon:

Q. Captain, you testified that you had taken a number of ships, towed a number of ships to sea?

A. Yes.

Q. In '47 and '48? A. Yes, sir.

Q. How many did you say?

A. About seventeen.

Q. Did you take the Young America up with the Sea Fox to Everett Shipyard in 1948?

A. Yes, sir.

Q. Did you take two other similar vessels to the Herald of the Morning up in 1948?

A. Yes, sir.

Mr. McKeon: I think that is all.

Mr. Morse: I didn't ask anything about that on direct examination—cross-examination, but——

Redirect Examination

By Mr. Morse:

Q. Which month did you take the Herald of the Morning? A. Up?

(Testimony of Rudolph T. Sommer.)

Q. Yes, sir. A. Which month? [214]

Q. Which month? A. November.

Q. I beg your pardon, I meant the Young America.

A. Young America, well, I haven't got the date down in my head, I don't remember which month that was. I think it was along in October, I wouldn't say for sure, I don't remember offhand, what date, what month it was.

Q. Which months did you take up these other vessels you referred to?

A. That was, oh, along in the year—oh, that would be in '47 or '48.

Q. Did you take any of them up in the winter months? A. Yes, sir.

Q. Which one?

A. Took one up just before the Herald of the Morning, I think it was, around October—I am not sure right offhand.

Mr. Morse: Well, I ask that the names of the vessels and the times when they were towed be produced for the record, please.

Mr. McKeon: I haven't got them.

Mr. Morse: Well, Captain Sommer has ability to ascertain that information.

Mr. McKeon: But I can get it, what you want is the vessels that he towed up in 1948, and when he did?

Mr. Morse: He referred to 1947, and 1948, serving as [215] Master.

(Testimony of Rudolph T. Sommer.)

Mr. McKeon: All right. This was on the Sea Fox, was it?

The Witness: Yes.

Mr. Morse: No further questions.

Mr. McKeon: That is all, Captain.

The Court: Step down.

Mr. Morse: Mr. McKeon, have you had an opportunity to ascertain the common officers and stock ownership between the Shipowners and Puget Sound?

Mr. McKeon: Well, yes, Mr. Thomas B. Crowley is a vice-president of the Puget Sound Tug and Barge Company, and vice-president of the ship-owners, that is the only common officer.

Mr. Morse: Mr. Crowley, Junior?

Mr. McKeon: Junior.

Mr. Morse: Is there common stock ownership in any respect?

Mr. McKeon: No, ownership consists of an ownership of fifty per cent interest with others in the Drum and Lighterage Co., which in turn has an interest in the Puget Sound Tug and Barge Company.

Mr. Morse: I gather from that that the Shipowners, with others, has a fifty per cent——

Mr. McKeon: Not the Shipowners, just the Crowleys.

Mr. Morse: I see, and of course the Shipowners is owned generally in stock?

Mr. McKeon: Majority being Crowley's. [216]

Mr. Morse: I don't want to accept that without

knowing definitely. But the only joint officer situation is the vice-president of both.

LAWRENCE ERWIN BELFORD

called as a witness on behalf of the respondents, sworn.

The Court: Your full name, please?

A. Lawrence Erwin Belford.

Mr. McKeon: I can't hear you.

The Witness: Lawrence Erwin Belford.

Mr. McKeon: Belford?

The Witness: B-e-l-f-o-r-d.

The Court: What is your business or occupation?

A. At that time I was a marine engineer. Now, I am the superintendent or manager of an office building in Oakland. [217]

The Court: Proceed, counsel.

Direct Examination

By Mr. Morse:

Q. Do you hold any sea-going papers, Mr. Belford?

A. Yes, I have the fifth issue of a chief engineer's license.

Q. For—— A. Unlimited.

Q. Unlimited. All vessels, all oceans?

A. Right.

Q. And how long have you had—that would be for, this would be in excess of 20 years that you have had a license?

(Testimony of Lawrence Erwin Belford.)

A. Expires March, '46. This was issued March, '46, and expires March of this year. It would be 25 years, with a chief's ticket.

Q. Have you served as engineer aboard sea-going vessels?

A. I have never served on anything else.

Q. Well, have you gone to sea? A. Right.

Q. For how many years?

A. Approximately 27 years.

The Court: In what capacity? Just briefly enumerate it.

A. Of course I started as an oiler, then third assistant, second assistant, first assistant and chief engineer.

Q. How long did you act as chief engineer, what period of [218] time? A. About nine years.

Q. About nine years? A. Yes.

The Court: All right. Proceed, counsel.

Q. (By Mr. Morse): You were chief engineer aboard the *Herald of the Morning* on the time when she was being towed between San Francisco and Everett? A. That's right.

Q. Did you personally examine the rudder as you were being towed up the coast?

A. (Nodding the affirmative.)

Q. What——

The Court: Speak so the Reporter will be able to hear you.

The Witness: I did.

Q. (By Mr. Morse): What position was the rudder in? A. Amidship.

(Testimony of Lawrence Erwin Belford.)

Q. And how were you able to ascertain that?

A. By your quadrant in the steering engine room.

Q. Your steering engine room is aft?

A. Aft.

Q. Immediately above the rudder?

A. Right.

Q. And there is an indicator on the quadrant which shows [219] the position of the rudder?

A. There is, right.

Q. And at least up until the storm or the weather of—strike that.

At least up until you broke adrift, did you daily inspect that rudder? A. I did.

Q. Did it remain in that same position?

A. It did.

Q. How many people were aboard the *Herald of the Morning*?

A. Fifteen, to my knowledge, or sixteen.

Mr. Morse: I will offer proof that there were sixteen, if the Court please.

The Court: Fifteen or sixteen, the witness says.

The Witness: That's right, fifteen besides myself; there were sixteen.

Q. (By Mr. Morse): Did you have any trouble between yourself and the tug as she started, after you left San Francisco? Trouble; by that I mean any breakdowns or anything of that character?

A. Yes. Broke down below Point Reyes and the *Sea Prince* towed us into Drake's Bay.

Q. Was the *Herald* following the *Sea Fox* directly aft? A. Right.

(Testimony of Lawrence Erwin Belford.)

Q. Prior to the time it broke down? [220]

A. That's right.

Q. Right after you left Drake's Bay, did you thereafter have trouble? A. No.

Mr. McKeon: I don't hear you.

The Witness: Not until we got up north. I mean—you mean did we break loose immediately, or?—

Q. (By Mr. Morse): Well, when did you next break loose?

A. On up off of Destruction Island.

The Court: What date was that? Fix the date, if you remember it.

A. I would only have to guess. I think it was the 13th. I am not sure.

The Court: That's all right.

Q. (By Mr. Morse): Have you looked at log records or anything to verify your memory as to the date? Have you recently looked at them?

A. Oh, I have looked at them, but these navigation problems, why, they are rather vague to me. I don't—

Q. They are outside your field?

A. The position and so forth, they don't mean anything to me.

Q. Well, describe to the Court the weather conditions on the date when you did break adrift, the second occasion. A. It was bad.

Q. Were you able to fix the degree of the [221] storm? A. No.

Q. Have you experienced weather comparable on any previous occasion? A. Oh, yes.

(Testimony of Lawrence Erwin Belford.)

Q. Have you ever been in that area of the Pacific Ocean on any previous occasion?

A. Yes.

Q. When would that have been?

A. Oh, many times from 1922 until last year and including last year.

Q. By the way, how long have you been working ashore? A. Since January of 1950.

Q. Is the area off the Oregon and the Washington coast considered an area of calm weather, or do they have storms in that area?

A. Well, always have seasonal storms.

Q. In November? Is that a seasonal storm?

A. You can expect normal seasonal storms in November.

Q. Do you recall the occasion after you broke adrift the second time and drifted for part of a day and then you were anchored? Do you recall that occasion? A. Right.

The Court: Will you fix that date?

A. Well, it was on a Tuesday, I think the 14th.

The Court: 14th, all right. [222]

The Witness: 13th or 14th.

The Court: All right.

Q. (By Mr. Morse): It was a Tuesday, as you recall it? A. That's right.

Q. Irrespective of the date, it was a Tuesday?

A. Right.

Q. Did you anticipate that you would go aground when you were anchored there? Did you fear that you would be driven ashore?

(Testimony of Lawrence Erwin Belford.)

A. Well, after we got our anchor out, no.

Q. Had the weather continued——

Mr. McKeon: If the Court please, I suggest that Mr. Morse let the witness testify. I think he is doing a lot of leading.

Mr. Morse: Well, I am doing a lot of leading; it has been fairly common so far in this proceeding.

Q. (By Mr. Morse): What was the weather as you were at anchor?

A. She was blowing pretty good.

Q. Had any Coast Guard vessels endeavored to put a line aboard your vessel prior to your——

A. Yes.

Q. Do you recall which one it was?

A. Well, there were two: The Winona and there was the smaller of the two.

Q. The Balsam, was it? [223]

A. Balsam, that's right.

Q. Where were you on the Herald of the Morning when the Balsam was in the process of putting a line aboard?

A. Well, we were all huddled up on the fo'c'sle deck.

Q. And that would be in the extreme bow of the vessel?

A. That's right, sheltered spots awaiting to take the line and heave it aboard.

Q. How was the Herald of the Morning with reference to the weather? How was she lying?

A. She was on the trough of the sea.

Q. So she would be broadside to the weather?

(Testimony of Lawrence Erwin Belford.)

A. That's right.

Q. What was the position of the Balsam at the time she shot a line across to you?

A. She came up on our lee side.

Q. Where did she go? Did she stay on your lee side or how did she maneuver? Just tell the Court how this transaction occurred.

A. Well, the first time when she was trying to get the line aboard, she remained on the lee side, but couldn't get close enough to us. And then she backed away and remained in the vicinity.

Q. And she came up a second time, did she?

A. Yes.

Q. How did she come up on the second [224] occasion?

A. Same way; up on the lee side of our starboard bow. That would be on our starboard bow, the wind was on our port side.

Q. Did she stay in your lee or was she maneuvering in some other position?

A. No, she remained on the lee side at all times.

Q. Well, was she abaft your beam or how was she?

A. Well,—

Q. With reference to your fore and aft length, that is?

A. Well, about opposite our bow.

Q. And about how far distant?

A. Oh, about—she kept at least a hundred feet away from us, using our Lyle guns to shoot lines over.

Q. Did they try once or more than once to shoot a line across to you?

(Testimony of Lawrence Erwin Belford.)

A. On, quite a few times.

Q. And ultimately they did succeed in getting a messenger line across? A. Eventually.

Q. Then what happened?

A. They put a ten-inch hawser on us.

Q. And how did you draw that hawser across to your vessel?

A. Well, she shot a messenger aboard and the main hawser was attached to the messenger. Well, it was a secondary rope in between, and we pulled that up a hawse pipe and secured it to the [225] bitts.

Q. What means did you have of pulling it across to your vessel, this 10-inch hawser?

A. Well, we got the 10-inch hawser, got that on deck, we attached a block and tackle and pulled with the block and tackle until the blocks were together, and then we secured the hawser and then took another bite on it with the block and tackle and pulled it up that way.

Q. Do you recall whether the Neptune—do you recall the tug Neptune, by the way? A. I do.

Q. Do you recall it endeavoring to get a line to you? A. I do.

Q. Now what position was the tug Neptune located with reference to your vessel and your getting a line across?

A. On one side of us just a little forward of our bow.

Q. The Neptune was a little forward of your bow? A. On the weather side.

(Testimony of Lawrence Erwin Belford.)

Q. And that would have been on the port side?

A. Port side.

Q. How was she headed, by the way?

A. She had her bow facing us.

Q. So that her stern would have been away from the weather or toward the weather?

A. Her stern would be into the weather.

Q. By the way, how was the Balsam headed? Which was her [226] heading with reference to the weather?

A. Her bow into the weather.

Q. How did you get a line to the Neptune?

A. Well, we dropped two life preservers over attached to a small line and let it drift out and the Neptune picked it up and attached a rudder to the line that was attached to the life preservers, and we pulled that aboard and then the secondary line, and then their cable.

Q. Did you ever succeed in getting any part of the cable aboard your vessel?

A. Yes, we just had about six or eight, or between five and ten feet on the deck getting ready to attach the hand billy to it, when the sea picked her up and slammed her against our bow and she started pulling away and we had to let go of the line.

Q. How many men of your crew were working up there at the fo'c'sle?

A. All of us.

Q. Did you see any other ships in the vicinity after you had broken adrift from—strike that.

A. Yes, the two——

Q. Just a moment, please. Name all the ships

(Testimony of Lawrence Erwin Belford.)

that you recall having seen from the time that the Sea Fox indicated that she was having trouble with her steering engine. Do you recall when she indicated that she was having trouble with [227] her steering engine? A. Yes.

Mr. McKeon: Just a moment. Would you read that last question to me again, please?

Mr. Morse: I mean towing engine, not steering engine. I am sorry.

Q. Did she indicate she had any trouble with her towing engine, the Sea Fox?

A. Not to my knowledge.

Q. All right. Did she ever communicate with you as far as you know, the Sea Fox, to the Herald of the Morning?

A. Well, they communicated with the captain with wig-wags, and I don't understand that mode of communication.

Q. Well, with reference to the time when you broke adrift from the Sea Fox, had any vessels come in your vicinity prior to that time?

A. From the time we broke adrift?

Q. Prior to that time had any vessels come in your vicinity?

A. Well, that I wouldn't know. We were under tow; I wasn't up on deck.

Q. All right. After you had broken adrift, did you recall whether any vessels were in your vicinity?

A. Yes, the two cutters and the navy repair ship.

(Testimony of Lawrence Erwin Belford.)

Q. Was that a small ship?

A. No, that was a large ship. [228]

Q. As big as your vessel? A. Yes.

Q. How long did that navy repair ship remain there?

A. Oh, she was around until after the cutter got a line aboard of us.

Q. Were there any tugs? There was the tug Neptune which you have been referring to?

A. The Neptune.

Q. Were there any other tugs?

A. I was told that another tug——

Mr. McKeon: Well, just a moment.

A. (Continuing): But I didn't see it.

Q. (By Mr. Morse): And then after you were at anchor, did any other tugs come up?

A. Well, the Neptune or the Hercules.

Q. Well, hadn't the Neptune sunk before you were at anchor?

A. No. Yes, we were adrift when the Neptune had its accident. We didn't know that the Neptune had sunk until after we got up at Puget Sound; the pilot came aboard and told us.

Q. I see. Anyway, the Hercules did come up to your vicinity after you were—— A. Yes.

Q. And the Sea Fox was there also?

A. Right.

Q. Tell us, was the Sea Fox the one that put a line aboard [229] you when you were at anchor, or was it some other vessel?

(Testimony of Lawrence Erwin Belford.)

A. Well, it was the cutter put the line aboard of us and then transferred it to the Fox.

Q. Which cutter was that?

A. Well, that was the larger one of the two.

Q. Do you recall the name?

A. Well, you have the name of the two tugs. I know one was larger than the other. The Balsam, I think, was the small one, or whichever it was. The names, I can't identify as to the individual cutters. But it was the larger, the white one of the two.

Q. How did she maneuver to put the line aboard you at that time?

A. She came up on our starboard bow, headed into the wind, shot the lines across with messengers from her Lyle gun.

Q. And you pulled them across to your vessel just as you have described these previous events?

A. Right.

Q. After departing, after you were at anchor there and departed, did you have any more trouble getting up into Everett? A. None at all.

Q. Did the weather pick up during that balance of the tow?

A. No. If I remember, the weather abated.

Q. Was your power plant in operation on the Herald of the Morning at any time? [230]

A. Everything was disconnected.

Q. She was what you would term a dead ship?

A. Dead ship.

(Testimony of Lawrence Erwin Belford.)

Q. What were your duties aboard the *Herald of the Morning*?

A. There was a gas-driven compressor installed on the deck, air lines extended down into the engine room connected to the bilge and ballast pumps. We checked, sounded the bilges morning and night to make sure of not making water. If they were, it was part of my duty to pump them out, and to assist in any way I could, such as disconnecting lines on the anchor chain when it became necessary and so forth.

Q. Speaking of that, did you have any trouble disconnecting the anchor chain on the starboard chain? The starboard chain is the one by which you were towed?

A. Oh, yes. You see, we have the weight of the chain to contend with. Well, there were connecting links every so often in the chain. I separated those links and then had to get chain fall to take up some slack so you could part the chain and then we could release the stopper and let her go in the water.

Q. That was done in respect to the starboard chain?

A. Right.

Q. Now in respect to your port chain on which you were riding at anchor?

A. Right. [231]

Q. Did you have any trouble disconnecting that on the 18th?

A. We couldn't disconnect it because all of the chain had been run out. Or we—well, there was 810 feet of chain and about 700 feet in the water, and that prevented the pelican hook from operating in

(Testimony of Lawrence Erwin Belford.)

the chain locker, to release it. There was no link in that community that we could separate, so the cutter shot a line aboard and sent a portable welding, burning set aboard and we burned a link loose and let her go.

Mr. Morse: No further questions.

The Court: We will take a recess for a few minutes.

(Recess.) [232]

The Court: Proceed, gentlemen.

Q. (By Mr. McKeon): Mr. Belford, you said that the Balsam approached the Herald while she was lying in the trough of the sea?

A. That's right.

Q. And got a line to the Herald after how many attempts, did you say? A. Oh, quite a few.

Q. Quite a few. What happened to that line when she eventually did get it aboard?

A. The loop where it was spliced back in the line gave way, very shortly after.

Q. It carried away?

A. That's right. It was defective splice.

Q. Did you look at the splice?

A. Not carefully, no.

Q. Why do you say it was defective?

A. The fact that it just slipped out so quickly, got the strain on it and started towing.

Q. In other words, it couldn't stand the strain, whatever the reason it couldn't stand the strain. Is that a fair statement?

(Testimony of Lawrence Erwin Belford.)

A. Well, it is a question of whether there was a strain that caused it to slip out, or a defective splice. Now, I wouldn't know. [233]

Q. You don't know whether it was defective or not, do you?

A. No, but the apparent quick release of it indicated it.

Q. Either that or the strain was too much, one or the other? A. One or the other.

Q. Then you said that the other cutter, the Winona, approached in the same fashion and eventually got a line aboard?

A. That's right.

Q. Were you on deck on both occasions?

A. I was.

Q. So that you know of your own knowledge that both vessels, the Winona and the Balsam, approached and got lines aboard in the same fashion?

A. The larger one of the two, the white cutter, the Winona is the one that put the lines aboard.

Q. The Balsam never got a line aboard?

A. To my knowledge, no.

Q. What did you mean by saying that they approached in the same fashion when they got lines aboard?

A. Well, the smaller cutter of the two wasn't able to get a line aboard.

Q. You never got a line aboard from the Balsam at any time? A. Not to my knowledge.

Q. What was the line that parted, from what cutter was it? A. The larger one.

(Testimony of Lawrence Erwin Belford.)

Q. The larger one? And in any event both of them approached [234] in the same manner?

A. That's right.

Q. And you think only one of them got a line aboard? A. That's right.

Q. That line parted promptly?

A. That's right.

Q. You think that was the larger of the two cutters? A. To my recollection.

Q. Which was the Winona. That is all.

Redirect Examination

By Mr. Morse:

Q. Mr. Belford, did the Coast Guard get a line to your vessel on one occasion or two occasions?

A. Two occasions.

Q. And the first line parted, is that right?

A. Right.

Q. The second line, did that part? A. No.

Q. The first line parted right at the splice?

A. Right.

Q. Normally, when a spliced line parts, does it normally part at the splice, is that the weaker link of the line?

A. That's right. The line did not break, the splice just pulled right out.

Q. Have you ever been employed by Waterman?

A. No, I have been for Sudden & Christenson. Of course, [235] there is a tie-in there, was, I guess.

Q. Never been employed directly. When you

(Testimony of Lawrence Erwin Belford.)

were at anchor just offshore—by the way, about how far was the shore, do you recall having been, at that time?

A. Well, they got us under way again. Let's see, we were seven or eight miles offshore.

Q. I think I asked you this before, did you fear that you were going to drift ashore when you were at anchor? A. Yes.

Q. And in addition to your anchor you did have the tug Sea Fox with a 12-inch manila hawser attached? A. That is right.

Mr. Morse: No further questions.

The Court: Step down.

Mr. McKeon: Just a minute, your Honor; I think the witness is quite different than what he answered in reply to my questions.

Recross-Examination

By Mr. McKeon:

Q. Did the Balsam pass a line to the Herald of the Morning, the Balsam being the smaller cutter?

Mr. Morse: I didn't ask him that, Mr. McKeon; I asked him as to the lines that were passed—

Mr. McKeon: Never mind what you asked, I want to ask the questions, please.

The Witness: The Balsam, that was the smaller of the two? [236]

Q. The smaller. A. No.

Q. She did not? A. No.

Q. And it was the Winona's that got aboard and parted, that is the larger of the two cutters?

(Testimony of Lawrence Erwin Belford.)

A. Right.

Q. So that only one cutter got a line aboard the Herald of the Morning, the Winona, the larger of the two?

A. To the best of my recollection. It was the one cutter that got both lines aboard.

Q. I beg your pardon?

A. It was the one cutter that got both lines aboard.

Q. The one that got both aboard, and on both occasions that single cutter approached the Herald in the same manner and got a line aboard in the same manner?

A. Right.

Q. Did you have any power aboard that vessel at all to haul lines?

A. None at all.

Q. You had nothing but manpower?

A. That's right, and rope falls.

Q. Did you have the rope falls on the steel pennant that the Neptune was trying to get you to take?

A. No, we hadn't had time to secure it. [237]

Q. Just working up there with the pennant itself?

A. That is right.

Q. That pennant is about a hundred and twenty fathoms, isn't it?

A. The length of it?

Q. Yes.

A. Oh, I couldn't say offhand, no.

Q. It is long?

A. Not a hundred and twenty fathoms.

Q. What is its length, fifteen fathoms, twenty?

A. I don't know how much they paid out to us, at least that.

(Testimony of Lawrence Erwin Belford.)

Q. At least twenty? A. Yes.

Mr. McKeon: That is all.

Mr. Morse: No further questions.

(Witness excused.)

JOHN B. SWEETING

called as a witness on behalf of the respondents;
sworn.

The Court: State your full name.

A. John B. Sweeting.

The Court: What is your business or occupation? A. I am a seafaring man.

The Court: In what capacity?

A. Sometimes master, sometimes mate. [238]

Q. How long have you been going to sea?

A. I started when I was sixteen. I made a living by shipping forty years.

The Court: Forty years. Just give us a resume of your various duties you have performed during that period.

A. Well, we were—they had been in the shipyard at Oakland Creek, Graham Shipyard, and prepared for the tow to Everett, Washington, and we were all ready, and the weather was—the trip was postponed one day on account of weather reports from the Red Stack Tow Boat Company that we wouldn't leave until the next day. So to the best of my recollection it was Friday we left.

We got up north—well, as we were going over, outside the main ship channel, the towboat, they

(Testimony of John B. Sweeting.)

went robbing crab pots, and finally we reached Point Reyes and proceeded north to Point Arena when the line carried away. And then we drifted almost back to Point Reyes. And then previous to that, the sea was calm. After the line carried away and we had a line drifted down on the lee side, with two buoys attached to it, and they got ahold of the two buoys and the line and then they left and came back in the morning. Later they came back and told us, the next day, that they had trouble with the towing engine and that the Sea Prince would come and take us up into Drake's Bay, which he did.

And then in the meantime the Sea Fox went robbing the [239] crab pots and the Sea Prince had a lot of trouble to get them back, took about an hour——

Q. (By Mr. Morse): Captain, your objection to the robbing of the crab pots was that you didn't get any crabs, did you?

A. No, sir, didn't get any. And then the Sea Prince she put a—the captain says to me afterwards when he come out and gave us the line, and he was going to give us a bridle, Tony, the deck-hand, objected to the captain giving the bridle, so didn't get it. It was a nice bridle, too.

And then the crew were very dissatisfied because they liked the set-up on the Sea Prince and they didn't like the set-up on the Sea Fox, because the way, they couldn't give us the line; if they had a Lyle gun they could shoot a line across and they

(Testimony of John B. Sweeting.)

would be no trouble at all, and if they had been on the job nine-tenths of the times, on the port bow and sometimes be way abaft or abeam heading the other direction.

The Court: What date is this?

The Witness: That would be a Friday we left, on the 5th. I want to see my—the log book, your Honor.

The Court: Do you have the log book?

The Witness: Number 5, 1948, at 9:30 a.m., let go lines fore and aft, clearing the dock at 0938, that is 9:38 a.m.

The Court: Want to get up to this storm as soon as we can, don't we?

Mr. Morse: Yes, we do, Judge. [240]

Q. What happened after you left Drakes' Bay on up the coast, did you experience weather?

A. Oh, we had ordinary weather, you know, which you experience at that time of the year up and down the coast.

Q. Blew pretty hard, didn't it?

A. It blew——

Q. It blew pretty hard?

A. We got into it here and there it was.

Q. Regardless of what it shows there in the log, at the time of the Sea Fox signalling to you that they were having trouble with their towing engine?

A. They came and told us, yes, when we were adrift. They had—I am not quite clear on that, I think they did, could see with the flashlight.

(Testimony of John B. Sweeting.)

Q. Did they or didn't they indicate to you they had trouble with the towing engine?

A. Yes, they did.

The Court: What time is this?

The Witness: Time the Sea Prince came, the Sea Prince.

The Court: No, I mean after you gone up the coast.

A. On the 14th—now, that is different. Yes, they indicated when we were 19 miles off North Head, that they were having trouble with their towing engine.

Q. (By Mr. Morse): You mentioned North Head, where is that?

A. That is on the Washington Coast, near the Columbia River [241] entrance. We were nineteen miles abreast of it then at that time.

Q. By the way, do you have a master's license unlimited? A. Yes, sir.

Q. Do you have any pilot's license?

A. Columbia River Bar and Columbia River, and San Francisco Bay.

Q. At that time on the 14th and on the 15th, in your opinion, could the tug have taken you through the Columbia River with the existing weather conditions?

A. Yes, sir, that was the only practical thing to do when they had trouble with their towing engine, to turn around and in a few hours, we could have been at—right at the entrance of the Columbia River, because it was only a few miles away.

(Testimony of John B. Sweeting.)

Q. You say you have a pilot's license on the Columbia River and the Bar? A. Yes, sir.

Q. And bearing in mind the weather conditions that were existing those days you think it was feasible to have gone——

A. Oh, most simple, quite simple, practically no wind to speak of and the Bar was smooth, practically smooth, because the wind had been coming from the northwest and the Bar is protected from a wind of that kind.

The Court: On the 14th?

The Witness: Sunday, the 14th, yes, sir, your Honor. [242]

Q. (By Mr. Morse): Will you look in your log to see what the weather, which direction the wind was from on the 14th?

A. Oh, I will see, then—but the point I want to make is a strong wind had been from the northwest, there was a change, I know. Let's see, the 14th, morning of the 14th, 4 a.m., six, seven in my log.

Mr. McKeon: Six, seven force?

The Witness: Yes, six, seven force, eight——

Q. (By Mr. Morse): Which direction?

A. South. Eight a.m. southeast seven. Twelve o'clock southwest seven. Four o'clock, west southwest seven. North Head abeam distance twenty miles, that is at nineteen hundred, that is 7 p.m. Twenty-one forty cutter Wagh 62 arrived from Astoria.

(Testimony of John B. Sweeting.)

Q. Captain, when did the Herald of the Morning break adrift? [243]

A. We had California time, daylight; it was different to Washington's time, so there was one hour's difference in the time. It was—But the right time was 0040, or forty minutes after 12 a.m. on Tuesday, the 16th, 1948.

Q. What was the weather at that time?

A. The weather—well, it was ordinary weather. I wouldn't call it extremely rough. But it wasn't fine.

The Court: What does the log show there on the 16th?

A. 16th?

Q. (By Mr. Morse): You wouldn't want to be out there in a canoe, though, would you, Captain?

A. No, sir, I would not, no.

South-West 6, West-South West 5 force.

Q. What hour? At what time, Captain?

A. At 4 p.m.

Mr. McKeon: On the 16th?

The Witness: Yes.

Q. (By Mr. Morse): 4 p.m.?

The Witness: M-hm.

Q. (By Mr. Morse): What about earlier on the 16th? A. It is not there.

Q. You have two logs there, one is a rough log and one is the smooth log. To which are you now referring? [244]

A. That was the smooth log. I am referring now to the rough log.

(Testimony of John B. Sweeting.)

Q. I think at 8 o'clock in your log is your only morning entry.

A. Well, you see, on that morning, the Neptune——

Q. Just read the weather entries. That is all the Judge wants.

Mr. McKeon: Well, wait a minute, wait a minute. I think he can use the log for the purpose of refreshing his recollection, your Honor.

The Court: Well, that is what he is trying to do.

The Witness: Well now, it is not here.

Mr. McKeon: It is not here?

The Witness: 4 p.m. is the first instance of the weather.

Q. (By Mr. Morse): Captain, look on the other sheet. I think you will find an entry at 8 a.m.

A. Well, I don't see it. Oh, yes, vessel drifting in southerly gale. No power, helpless. Tug Sea Fox—yes. Southerly gale, yes.

Mr. McKeon: What hour is that, Captain?

The Witness: That is 8 a.m. No. Yes. No, no, that is 8 at night. That is 8 at night.

Q. (By Mr. Morse): Isn't that 0800, Captain?

A. Sir?

Q. Isn't that 0800? [245]

A. Yes, 0800. That's right, 0800. That's right, that's 8 a.m. That is on the other sheet, though. You see, it was a hectic time then. We had been taking lines from the Balsam and we took one, she shot one across, and then changed their mind and then they came back again.

(Testimony of John B. Sweeting.)

The Court: On the 16th?

A. On the 16th, yes, sir.

We finally got that line and it carried away where it made contact with the ship, and it was really—And then another ship had come up alongside of us and we were all very busy then and we were concerned mostly, your Honor, concerned about the lines, taking the lines from the different vessels that attempt, or made the attempt to get one to us. That's why we overlooked this entry in the log.

Q. (By Mr. Morse): Captain, did you get a line from the Balsam on the 16th?

A. Yes, sir, we did.

Q. Is it noted in your log?

A. Yes. Let me see. But it didn't last long. It carried it away.

Q. What is the notation in your log about the Balsam?

A. It says about the Neptune being alongside at 8:30, for a tow line. "All hands standing by. Run messenger line over the side." I don't see anything about the Balsam. But Captain Sprague, the Captain of the Neptune—— [246]

Q. Just a moment, please.

A. (Continuing): He was on——

Q. Just a moment, please. There is no entry in your log on that date for the Balsam, is that correct?

A. Well, it may be here, but I don't see it.

(Testimony of John B. Sweeting.)

Q. Well, I think as a matter of fact there is no such entry?

Mr. McKeon: Is counsel testifying?

Mr. Morse: I think I could testify on that, Judge.

The Court: Well, he has some difficulty here.

Mr. Morse: I think the fact of the matter is, there is no entry on the 16th with reference to the Balsam.

The Court: All right.

Q. (By Mr. Morse): There is an entry with reference to the Neptune, however?

A. Yes, on the lee bow.

Q. On the lee bow; is that what it says?

A. Yes, that's right. He failed to make it, to get the line to us, see.

Q. He tried to get it?

A. He failed to do it.

Q. Well, what is the entry in your log?

A. 8:30, "Neptune, tug Neptune alongside to put tow cable aboard. All hands standing by."

0900. "Run messenger line over side. Hauled in cable. Same became * * *" "and tug" * * * "took—too close to [247] ship stem, was hit."

Oh, this is when she was hit, yes. I was confused on that. That's it.

Q. Captain, were you up there on the fo'c'sle head when the Neptune was attempting to put a line to your ship? A. Yes.

Mr. McKeon: Pardon me. May I look at that?

(Testimony of John B. Sweeting.)

Q. (By Mr. Morse): Are you paying attention to me, Captain? A. Yes, sir.

Q. Now, was the Neptune on your lee bow or on your weather bow?

A. You mean the first time?

Q. When she was holed, when she was struck.

A. Oh, she was on our weather bow.

Q. Had she come up on a previous occasion?

A. Yes, on the lee bow.

Q. I see. And on that previous occasion she had not gotten a messenger line to you, when she came up on your lee bow?

A. She did, she got—we got the heaving line to them and they got it and they hauled on the messenger, but then they went away, they didn't make the attempt at all. They didn't complete the job.

Q. What time of the day was that that she was on your lee bow?

A. Oh, as near as I can remember, it was 11 o'clock at night. [248] I am not sure of the time. But I remember the incident.

Q. In other words, it was the night preceding the day she was sunk? A. That's right.

Q. I see. So——

A. (Continuing): I might be wrong in the time a little.

Q. But it was night time, anyway?

A. Night time.

Q. And dark? A. On the lee bow, yes.

Q. But when she came up on the weather bow,

(Testimony of John B. Sweeting.)

that was the time you were getting the wire across to your vessel?

A. Yes. We didn't quite get it over in through the leads, and it was pulled out of our hands. They pulled it out. That was one time that—then they made another attempt and that was the time the trouble started. They got broadside onto the sea and the stem of the Herald cut through the bilge.

Q. About how long on this occasion when she was in collision with your vessel, had the Neptune had been right forward of you trying to get the line to you? A. One hour; about one hour.

Q. Had the Balsam put a ten inch line to you before or after the Neptune had been in collision with you? A. Before.

Q. And they had gotten a messenger line to you by means of [249] their Lyle gun? A. Yes.

Q. By the means of their Lyle gun, is that correct? The Balsam?

A. (Nodding head in the affirmative.)

Q. Now——

The Court: You must answer. He must get it down. What is the answer?

The Witness: Sir, what is it?

The Court: He shook his head; he didn't answer.

Q. (By Mr. Morse): You shook your head. Did you mean yes or no?

A. Well, what is the question again? Do you remember?

Q. How did the Balsam get a line to you?

(Testimony of John B. Sweeting.)

A. Oh, by a Lyle gun. She shot a tape and then a bigger tape and then a bigger tape, and then a smaller line and then a messenger and then the tow line. That's how it runs.

Q. You drifted all during the day of the 16th, is that correct? A. Yes, sir. ..

Q. Until it was dark? A. Yes, sir, yes.

Q. And then you anchored? A. Yes.

Q. Under whose orders? [250]

A. The Sea Fox, Captain of the Sea Fox.

Q. They came over to you and directed you to drop your anchor? A. Yes.

Q. Do you recall what he said to you?

A. "Drop your anchor." And I said, "Who said so?" because I had already had the understanding that if there was a case of any orders, that the Captain of the Sea Fox was in charge. So I was taking my orders from him. Although I had a little trouble with the mate. He kept, you know, he kept taking——

Q. All right. Did the Captain of the Sea Fox say whose orders they were?

A. No, not at that time.

Q. Anyway, you did drop your anchor, or didn't you?

A. Yes, dropped the anchor at the Captain of the Sea Fox's orders, yes.

Q. And the following morning did a vessel put a line to you? A. Yes.

Q. When you were still at anchor?

A. Yes.

(Testimony of John B. Sweeting.)

Q. Which vessel was it?

A. The revenue vessel, Winona—the Winona.

Q. What happened then?

A. She passed it over to—she gave us the line by a lee [251] gun. She come over, come up on the lee bow. Everything come up on the lee bow up until that time and the only exception was the Neptune.

Q. And the Winona passed its line to the Sea Fox?

A. Yes.

Q. Captain, did the weather worsen on the 18th after you were taken in tow?

A. Oh, no, it got much better. It was much better. I want to refer——

Q. What does your log show as to the weather on the 18th?

A. 18th?

Mr. McKeon: Here it is here, Captain.

Mr. Morse: He has the smooth log.

Mr. McKeon: This is the log of original entry?

The Witness: You want the 18th weather?

Mr. Morse: Yes.

Mr. McKeon: There is your rough log, Captain (handing to the witness).

Mr. Morse: Mr. McKeon, he has both the smooth and the rough log there.

The Witness: All right.

A. 4 a.m., the 18th. Easterly 3, west 3, south-east 4.

Q. (By Mr. Morse): Wait a minute. What are the hours here?

A. 4 a.m., easterly 3. 8 a.m., westerly 3. Noon,

(Testimony of John B. Sweeting.)

south-east 4. 4 p.m., south-east 6. 8 o'clock, south-east 7. [252] Midnight, south-east 7.

Q. Now bearing in mind the wind and weather as shown there on your log, had you stayed at anchor on the 18th instead of being towed into Everett, in your opinion would you have drifted ashore?

A. No, sir, we would not, because, I would like to say that, we had weathered the storm and then when we got the line, we were perfectly safe when we had the line from the Sea Fox. We had nothing to worry about.

Q. The Sea Fox plus the anchor, you had nothing to worry about? A. Sir?

Q. The Sea Fox plus your anchor—you had nothing to worry about?

A. Then we were safe, because we had weathered it with the anchor alone, a heavier wind and heavier seas. So in my opinion, I no longer worried. I had worried up until that time, but then when I had the Sea Fox's tow line, I had nothing to worry about. I was free from all worry.

Q. In addition, were there any other vessels besides the Sea Fox in your vicinity?

A. In addition?

Q. When you were at anchor?

A. Oh, the Balsam, Sea Fox, Winona and then the Hercules came up later. [253]

Mr. Morse: No further questions.

(Testimony of John B. Sweeting.)

Cross-Examination

By Mr. McKeon:

Q. Captain Sweeting, you had how many men aboard your Herald?

A. Sixteen, including myself.

Q. And a chief officer? A. Yes, sir.

Q. A second officer?

A. A second officer and a third officer.

Q. And a third officer?

A. Third officer, yes.

Q. And yourself. So that you had four licensed men on board? A. Yes, that's right.

Q. And there was really a sort of knock-down, skeleton crew to take that dead ship up?

A. It was a crew approved by the Bureau of Shipping, those in authority; it was a crew approved by them.

Q. Well, you just joined the Herald to take her up there, didn't you? A. Yes, that's right.

Q. What was the last command prior to the Herald that you had? A. The Cosatot.

Q. The what? [254]

A. Cosatot. The United States Navy tanker Cosatot.

Q. During the war?

A. No, on a run up there, a run up to Seattle.

Q. For repairs? A. Sir?

Q. For repairs? A. Yes.

Q. She was towed up there? A. Yes.

Q. But what was the last command you had as

(Testimony of John B. Sweeting.)

a Master of a steamer or a steam schooner going out prior to '48? A. '48?

Q. Yes.

A. I didn't have any, but I have had lots of experience. I have had experience as mate, second mate, third and all kinds of vessels.

Q. But you have never taken a ship out under her own power? A. Where?

Q. To sea as a master, have you?

A. To sea?

Q. Yes.

A. No, but I will tell you, I would like to say my license was used on three trips over the Columbia River bar.

Mr. McKeon: That's all, your Honor.

Mr. Morse: One other question. [255]

Redirect Examination

By Mr. Morse:

Q. Did you ever work for shipowners?

A. Yes.

Q. For how long? A. Five years.

Q. In what capacity?

A. Mates, second mate, deckhand.

Q. On tugs? A. Yes, on tugs.

Q. Did you go offshore with them?

A. Yes, lots of experience offshore there. I mean, along the coast, yes, coastwise, towing.

Mr. Morse: No further questions.

(Witness excused.)

Mr. McKeon: The log?

The Court: The log books are here, both of them (indicating).

Mr. Morse: Do you wish to have them identified?

Mr. McKeon: Well, I don't know what you planned to do with them. I just wanted—I haven't had a chance to look at that log.

Mr. Morse: You may look at either or all of them, if you wish, Mr. McKeon. I wish to offer at this time the deposition of Captain F. G. Eastman, taken on behalf of Waterman Steamship Corporation. Captain Eastman was the Master of the [256] Coast Guard cutter Winona. And I offer that together with the attached exhibits.

Mr. McKeon: Well now, if the Court please, the deposition has been taken on stipulation, and I don't think the exhibits to which they refer are admissible in evidence, and when you take a man's deposition, he is supposed to testify and not merely introduce some report he made to somebody else. We have not had the opportunity of cross-examining the witness on his reports, and——

Mr. Morse: You had the opportunity of cross-examining Captain Eastman. He was in charge of the vessel and the deposition speaks for itself as to the—I think Mr. McKeon is referring to the weather at various times.

Mr. McKeon: Let me—I am referring to—let me state my position, your Honor. There isn't anything that I don't want your Honor to have, and I think that's peculiarly true in a case of this sort.

I don't think these exhibits are admissible in evidence on any theory, but I am perfectly willing to have the record go in.

Mr. Morse: All right, then, there is no objection?

Mr. McKeon: You put it to me in such a fashion that I don't want to be——

Mr. Morse: Also offer in evidence the deposition of Lieutenant Frank G. Schmitz, who was master of the Coast Guard cutter Winona, together with attached exhibits in each case, [257] in each instance.

The Clerk: The first one, Captain Eastman's, is marked as respondent's Exhibit F and respondent's Exhibit G on Lieutenant Schmitz, admitted and filed in evidence.

(Whereupon depositions of Captain Eastman and Lieutenant Schmitz, referred to above, were received in evidence and marked respondents' Exhibits F and G, respectively.)

Mr. Morse: Mr. McKeon, would you be willing to stipulate that the towing or towage account of \$5,750 plus tax has been received by shipowners?

Mr. McKeon: I don't know what the fact is. If you state it has been—I don't know; I really don't know.

Mr. Morse: I don't know either, Mr. McKeon.

Mr. McKeon: I don't know whether it has or not.

Mr. Morse: So we will find out the facts.

The Court: It is nearly time to adjourn. You may check it over the noon hour.

Mr. McKeon: I think we might finish up, your Honor; don't you think, Mr. Morse, in a minute or two?

Mr. Morse: It would be a matter of ten or fifteen minutes.

The Court: Very well.

Mr. Morse: I am perfectly willing to come back if you prefer.

The Court: I thought you possibly had something that you [258] wanted to——

Mr. McKeon: Well, I wouldn't want to impose on your Honor, no. I thought possibly we could finish up in a minute or two. I think we can come back at two, then.

The Court: Well, whatever you wish.

Mr. McKeon: I think we are all inclined to take advantage of the Court, and——

Mr. Morse: I think it would be better if we came back at two.

The Court: Very well.

(Whereupon a recess was taken until two o'clock p.m. this day.) [259]

January 22, 1951, at 2 o'Clock P.M.

The Court: Proceed.

Mr. Morse: We are offering as respondent's exhibit next in order a letter from the Weather Bureau Office, Seattle-Tacoma Airport, dated De-

ember 23rd, 1949, with two sheets attached, as being the "storm warnings which were issued during the year and are enclosing copies of storm warnings for the period November 1st to 20th, inclusive, 1948."

Mr. McKeon: That is the other one?

Mr. Morse: Yes, sir.

The Clerk: Respondent's Exhibit H admitted and filed in evidence.

(Whereupon Seattle-Tacoma Airport storm warnings dated 12/23/49, referred to above, were received in evidence and marked Respondent's Exhibit H.)

RESPONDENT'S EXHIBIT H

United States Department of Commerce
Weather Bureau

Weather Bureau Office,
Seattle-Tacoma Airport,
Seattle 88, Washington.

December 23, 1949

Graham & Morse,
Attorneys at Law,
310 Sansome Street,
San Francisco 4, California.

Gentlemen:

In reply to your request of December 16, 1949, for twice-daily forecasts for the period November 1 through November 20, 1948, issued by this office, you are advised that this office moved from its location at Boeing Field to the Seattle-Tacoma Air-

port on November 30 of this year and at the time of the move the entire file for the year 1948 was lost.

However, we do have in our files the storm warnings which were issued during the year and are enclosing copies of the storm warnings for the period November 1 to 20 inclusive, 1948.

It is hoped that this information will serve your purpose.

Very truly yours,

/s/ THOMAS E. JERMIN,

Supervising District
Forecaster.

encl.

TEJ/elp

Storm Warnings, November 1 to 20, Incl., 1948

November 1, 1948.

Hoist northeast storm warnings 0530 Mouth Columbia to Cape Blanco for northeast winds increasing locally to 30-45 mph decreasing tonight. Small craft warnings Washington Coast north Mouth Columbia to Tatoosh Island for increasing northeast winds, 25-30 mph.

November 2, 1948.

Hoist southeast storm warnings 7:00 a.m. Tatoosh Island to Cape Blanco and Inland Washington Waters for increasing southerly winds reaching 40-50 mph this afternoon, veering to westerly Wednesday.

November 3, 1948.

Change southeast warnings to southwest storm warnings 7:00 a.m. for westerly winds 35-45 mph Tatoosh to Cape Blanco and all Washington waters decreasing to 25-35 mph tonight.

November 4, 1948.

Continue southwest storm warnings Tatoosh Island to mouth Columbia for increasing southwest winds reaching 30-40 mph this afternoon veering to westerly Friday.

November 4, 1949.

Southeast storm warnings ordered 3:00 p.m. to 7:00 a.m. Friday, Oregon Coast mouth of Columbia to Cape Blanco for increasing southerly winds reaching 30-40 mph early tonight shifting to westerly by morning and decreasing. Southeasterly storm warnings ordered inland waters Washington and Straits of Juan de Fuca 3:00 p.m. to 7:00 a.m. Friday for increasing southeasterly winds reaching 30-40 mph this evening shifting to westerly by morning and decreasing.

November 13, 1948.

Southeast storm warnings ordered displayed Washington Coast and mouth of Columbia, small craft warnings south of Astoria to Cape Blanco and over inland waters of Washington 3:00 p.m. for southeasterly winds 35-45 mph Washington Coast, and 25-35 mph Oregon Coast tonight, shifting to westerly early Sunday and decreasing, and southerly winds 20-30 mph over inland waters.

November 14, 1948.

Change storm warnings to southwest storm warnings Washington Coast. Continue small craft warnings Oregon Coast, inland waters Washington and Strait of Juan de Fuca 3:00 p.m. southwesterly winds 30-40 mph off coast this evening becoming westerly and decreasing to 25-35 mph Monday. Southerly winds 25-35 mph inland waters, easterly 25-35 thru Straits tonight decreasing Monday.

November 15, 1948.

Lower storm warnings Washington Coast and mouth of Columbia 10:00 a.m. Hoist small craft till 3:00 p.m. Continue small craft Oregon Coast inland waters Washington, Strait of Juan de Fuca till 3:00 p.m.

November 15, 1949.

Hoist southeast storm warnings 5:00 p.m. coastal stations Tatoosh Island to Cape Blanco for increasing southerly winds 30-45 mph shifting to westerly Tuesday. Hoist small craft warnings thru Straits Juan de Fuca 5:00 p.m. for southeast winds 20-30 mph.

November 15, 1948.

Southeast storm warnings were hoisted 10:00 p.m. thru Straights on the Sound for increasing southerly winds 30-45 mph.

November 16, 1948.

Change storm warnings to small craft warnings 5:00 p.m. for gusty southwesterly winds tonight and

early Wednesday inland waters Washington and on Coast from Tatoosh thru mouth of Columbia.

November 18, 1948.

Hoist Southeast storm warnings 9:00 a.m. to 4:00 a.m. Puget Sound and Washington inland waters. Increasing southerly winds 30-40 mph.

November 19, 1948.

Change storm warnings to SW 4:00 a.m. Coast Washington and Oregon, Tatoosh to Cape Blanco for southwesterly winds 35-45 mph this morning, becoming northwesterly this afternoon and decreasing to 15-25 mph by early Saturday.

[Endorsed]: Filed January 22, 1951.

Mr. Morse: And for respondent's exhibit next in order, a letter from the Weather Bureau forecast center, San Bruno, dated December 16, with eight attached sheets, being "all forecasts and warnings for the Coastal area from Cape Blanco to Point Conception that were issued by the forecast center during the period from November 1 to 20th, 1948."

The Clerk: Respondent's I admitted and filed in evidence.

(Whereupon San Bruno Weather Bureau forecasts dated 11/1/48 to 11/20/48, referred to above, were received in evidence and marked Respondent's Exhibit I.) [260]

RESPONDENT'S EXHIBIT I

United States Department of Commerce

Weather Bureau

Forecast Center

San Bruno, California

December 16, 1949

Mr. F. L. Tetreault,
Graham and Morse,
310 Sansome St.,
San Francisco 4, California.

Dear Mr. Tetreault:

In compliance with your telephone request to Mr. Vernon yesterday we have attached herewith copies of all forecasts and warnings for the coastal area from Cape Blanco to Point Conception that were issued by the Forecast Center during the period from November 1 to 20, 1948.

Very truly yours,

EDWARD M. VERNON,

Official in Charge.

By /s/ MARK J. COCUZZI,

Technical Assistant.

Encls.

[In margin]: Herald of the Morning.

Respondent's Exhibit I—(Continued)

Weather Bureau Airport Station

San Bruno, California

Forecasts Issued for the Coastal Area from Cape Blanco to Point Conception for the period November 1 to 20, 1948

Nov. 1, 1948, 0630 PST

Strong to gale force winds Pt. Arena to Cape Blanco and moderate to fresh southerly Pt. Arena to Pt. Sur and moderate westerly south of Pt. Sur today and tonight. Rain north of Monterey today and extending to near Pt. Conception during night.

Nov. 1, 1948, 1830 PST

Moderate to fresh southwesterly winds with occasional rain tonight and Tuesday.

Nov. 2, 1948, 0630 PST

Moderate southerly winds and partly cloudy weather from Pt. Sur north to Cape Blanco, Oregon, increasing to strong southerly from Pt. Reyes northward tonight with rain. Moderate northwest winds today and tonight south of Pt. Sur backing to southwest late tonight. Fair weather with increasing cloudiness tonight.

Nov. 2, 1948, 1830 PST

Moderate to fresh southwesterly winds tonight and Wednesday, except occasional strong north of Pt. Reyes. Cloudy with occasional rain.

Nov. 3, 1948, 0630 PST

Light northwest winds early this morning increasing to 20 to 25 mph this afternoon and tonight.

Respondent's Exhibit I—(Continued)

Partly cloudy weather with a few scattered light showers yet today and clearing tonight.

Nov. 3, 1948, 1830 PST

Fresh northwest winds tonight subsiding Thursday. Fair weather becoming cloudy north of Pt. Arena Thursday.

Nov. 4, 1948, 0630 PST

Moderate northerly winds today and becoming gentle southwest tonight north of Cape Mendocino. Fresh northerly winds today and tonight from Pt. Reyes to Pt. Conception decreasing late tonight. Fair weather except for increasing clouds tonight north of Cape Mendocino.

Nov. 4, 1948, 1830 PST

Moderate northwesterly winds tonight becoming gentle variable Friday, except fresh northwesterly near Pt. Conception tonight and Friday. Fair weather.

Nov. 5, 1948, 0630 PST

Gentle northerly winds and clear weather today and tonight.

Nov. 5, 1948, 1830 PST

Gentle variable winds tonight becoming gentle to moderate northerly Saturday. Fair except patches of fog tonight and early Saturday.

Nov. 6, 1948, 0630 PST

Moderate northwest winds today and tonight. Fair weather except for local fog today south of Mon-

Respondent's Exhibit I—(Continued)

terey and north of Pt. Reyes with fog increasing tonight.

Nov. 6, 1948, 1830 PST

Moderate to fresh northwesterly winds tonight and Sunday. Cloudy with local fog.

Nov. 7, 1948, 0630 PST

Moderate to fresh northwesterly winds today and tonight, except gentle variable north of Cape Mendocino. Fair weather.

Nov. 7, 1948, 1830 PST

Fresh to strong and northwest winds tonight and Monday. Clear.

Nov. 8, 1948, 0630 PST

Fresh to locally strong north to northeast winds with clear weather today and tonight.

Nov. 8, 1948, 1830 PST

Gentle to moderate east or northeast winds north of Pt. Reyes and gentle to moderate southerly winds Pt. Reyes to Pt. Conception tonight and Tuesday. Clear.

Nov. 9, 1948, 0630 PST

Gentle to occasionally moderate changeable winds today and tonight, with fair weather.

Nov. 9, 1948, 1830 PST

Gentle variable winds tonight and Wednesday. Clear.

Nov 10, 1948, 0630 PST

Gentle to moderate northerly winds today and tonight with fair weather.

Respondent's Exhibit I—(Continued)

Nov. 10, 1948, 1830 PST

Gentle to moderate northwest winds. Fair weather.

Nov. 11, 1948, 0630 PST

Gentle to moderate northerly winds with fair weather. Occasional fog north coast.

Nov. 11, 1948, 1830 PST

Gentle variable winds tonight and Friday becoming mostly northwesterly on Friday afternoon. Clear except for some local early morning fog areas.

Nov. 12, 1948, 0630 PST

Gentle north and northwest winds becoming 12 to 18 mph this afternoon and tonight. Fair weather except for local fog north of Fort Bragg and patches of fog forming elsewhere tonight.

Nov. 12, 1948, 1830 PST

Gentle to moderate west to northwest winds tonight and Saturday. Local fog or low clouds mainly from near San Francisco north and fair otherwise, except for some light rain north of Crescent City late tonight and Saturday morning.

Nov. 13, 1948, 0630 PST

Northwest winds 8 to 12 mph today and tonight. Fair weather except for a few patches of fog this morning.

Nov. 13, 1948, 1830 PST

Gentle to moderate west to northwest winds from San Francisco south and moderate to fresh southerly northward tonight and Sunday. Local fog to-

Respondent's Exhibit I—(Continued)

night and Sunday morning becoming cloudy from Pt. Sur north and with light rain from Pt. Arena north Sunday spreading to near Pt. Reyes by afternoon.

Nov. 14, 1948, 0630 PST

Gentle variable winds today and tonight, except moderate to occasionally fresh southerly north of Pt. Arena. Cloudy north of Pt. Arena with rain tonight but considerable fog south portion with fair weather this afternoon.

Nov. 14, 1948, 1830 PST

Fresh to strong southerly winds north of Pt. Arena tonight becoming westerly Monday. Moderate west and northwest winds south of Pt. Arena to Pt. Conception. Cloudy with occasional rain north of Pt. Arena tonight, spreading to Monterey early Monday.

Nov. 15, 1948, 0630 PST

Moderate to fresh southwesterly winds north of San Francisco and moderate west to northwest south of San Francisco. Cloudy weather with occasional rain north of Monterey today and tonight.

Nov. 15, 1948, 1830 PST

Moderate to fresh southerly winds tonight from Pt. Arena north and gentle variable elsewhere. Fresh to strong southerly winds Tuesday from near Pt. Reyes north and gentle to moderate southerly elsewhere. Cloudy from near Pt. Arena north, becoming cloudy from near Pt. San Luis north

Respondent's Exhibit I—(Continued)

Tuesday, with rain from Pt. Arena north in morning spreading south to San Francisco by late afternoon or evening.

Nov. 16, 1949, 0630 PST

Strong to gale force southeast and south winds Cape Blanco to Pt. Reyes becoming westerly and decreasing tonight with intermittent rain. Increasing southerly winds Pt. Reyes to Pt. Sur reaching 25 to 30 mph this afternoon and early tonight becoming westerly late tonight. Occasional rain beginning this afternoon. Gentle northwest winds to the south of Pt. Sur becoming moderate southerly and cloudy tonight with light rain late tonight.

Nov. 16, 1948, 1830 PST

Moderate to occasionally fresh northwest winds tonight and Wednesday with fair to partly cloudy skies.

Nov. 17, 1948, 0630 PST

Fresh northwest winds today becoming light to moderate tonight. Fair weather.

Nov. 17, 1948, 1830 PST

Moderate northwest winds tonight becoming gentle Thursday except occasionally fresh near Pt. Conception. Fair weather.

Nov. 18, 1948, 0630 PST

Moderate northwest winds from Cape Mendocino to Pt. Conception today, becoming gentle tonight with fair or occasional high cloudiness. From Cape

Respondent's Exhibit I—(Continued)

Mendocino to Cape Blanco moderate southwest winds today and tonight with cloudy weather.

Nov. 18, 1948, 1830 PST

Increasing southerly winds north of Cape Mendocino tonight becoming strong to gale and then decreasing Friday. Moderate southwesterly winds south of Cape Mendocino to the Farallones and Gentle to Moderate variable southward to Pt. Conception. Rain north of Fort Bragg and variable high cloudiness elsewhere.

Nov. 19, 1948, 0630 PST

Fresh southerly winds Cape Blanco to Pt. Sur becoming westerly this afternoon and fresh west and northwest tonight. Light showers clearing this afternoon. Moderate westerly winds south of Pt. Sur with cloudy weather today and tonight. Fresh northwest winds and fair entire area Saturday.

Nov. 19, 1948, 1830 PST

Moderate to fresh northwest winds tonight and Saturday. Partly cloudy.

Nov. 20, 1948, 0630 PST

Moderate to fresh northwest winds diminishing tonight and Sunday. Fair weather.

Nov. 20, 1948, 1830 PST

Gentle to moderate northwesterly winds tonight and Sunday, with fair weather.

Respondent's Exhibit I—(Continued)

Weather Bureau Airport Station
San Bruno, California
Storm Warnings* Issued for the Period
November 1-7, 1948
*and Smallercraft

November 1, 1948, 1130 GCT

Southeast storm warnings were hoisted at 1130-GCT Monday Point Arena, California, northward to Cape Blanco, Oregon, for strong to gale winds next 24 hours. Intense storm centered at 0630 GCT about 350 miles west-northwest of Eureka apparently moving east-northeastwardly.

CHAPPELL.

November 1, 1948, 2100 GCT

Smallercraft warnings ordered 1330 PST Monday San Francisco Bay and on coast south of Point Arena to Point Sur. Southeast storm warnings are displayed until 0330 PST, Tuesday, Point Arena to Cape Blanco.

WILGUS.

November 2, 1948, 1600 GCT

Smallercraft warnings continue 0700 PST today from Point Sur to the Oregon border for moderate southerly wind increasing to 25 to 35 mph from Cape Mendocino north and 20 to 25 mph south to Point Sur later tonight. Intense storm 600 miles off British Columbia coast with marked storm front south to latitude 40.

COUNTS.

Respondent's Exhibit I—(Continued)

November 4, 1948, 1535 GCT

Smaller craft warnings ordered at 0600 PST in San Francisco Bay region until noon today except till sunset on Suisun Bay. North and northeast wind 25 to 35 mph subsiding this afternoon.

COUNTS.

November 7, 1948, 1650 GCT

Smaller craft warnings will be displayed from 0900 PST until sunset today in the San Francisco Bay Region for northeasterly winds 25 to 35 mph.

RASEY.

November 7, 1948, 2130 GCT

Smaller craft warnings are displayed until 1200 PST Monday on the northern California coast from Point Conception northward for northeast wind 25 to 35 mph.

QUINN.

November 8, 1948, 0900 PST

Continue smaller craft warnings from 2000 GCT Monday until 0000 GCT Tuesday over the San Francisco Bay Region for easterly winds 20-30 mph.

RASEY.

Weather Bureau Airport Station

San Bruno, California

Storm Warnings Issued for the Period

November 15-21, 1948

November 14, 1948, 1230 PST

Hoist smaller craft warnings 1 p.m. PST for south-

Respondent's Exhibit I—(Continued)

erly winds 25 to 35 mph Cape Blanco to Pt. Arena today shifting to westerly tonight.

RASEY.

November 16, 1948, 1520 PST

Hoist southeast storm warning six a.m. PST Point Reyes to Cape Blanco, Oregon, for strong to gale force southeast and south wind today shifting to westerly and decreasing tonight. Hoist smallcraft warning same time south of Point Reyes to Point Sur for southerly wind 25 to 30 mph this afternoon and evening shifting to westerly and decreasing early Wednesday.

COUNTS.

November 16, 1948, 2015 PST

Lower storm warnings 830 p.m. PST from Cape Blanco to Pt. Reyes.

RASEY.

November 18, 1948, 1700 PST

Hoist southeast storm warnings 1800 PST Cape Blanco to Cape Mendocino for strong to gale southerly winds tonight. Warnings to continue until 1000 PST Friday.

R.V.W.

November 19, 1948, 0115 PST

Hoist smallcraft warnings 0400 PST and continue until 1800 PST Friday south of Cape Mendocino to Point Montara for southerly winds twenty to thirty miles per hour today shifting to westerly and decreasing tonight.

WILGUS.

Respondent's Exhibit I—(Continued)

November 19, 1948, 0845 PST

Lower all storm and smallcraft warnings from Cape Blanco to Point Montara 0900 PST.

COUNTS.

[Endorsed]: Filed January 22, 1951.

Mr. Morse: And also a big batch of material which, according to the Coast Guard letter to ourselves dated 24 January, 1950, constitutes "All available weather broadcast scripts transmitted by Coast Guard radio stations, Westport, Washington, M.N.W. and San Francisco, San Bruno, California, N.M.C. for the period 1/20/48."

The Clerk: Respondent's J admitted and filed in evidence.

(Whereupon Coast Guard weather scripts referred to above were received in evidence and marked Respondent's Exhibit J.)

Mr. Morse: In order that the Court be advised of the different points and locations to which the record has referred, we are supplying a chart of the coast. I don't care whether it is marked as an exhibit, but it is available for the Court's information.

The Court: Well, I would like to analyze this. There has been much of this matter going in here that I can't follow. For example, is there any controversy about the weather at any time?

Mr. Morse: No substantial controversy, no, sir.

The Court: Is there any controversy about the shore line and the distances?

Mr. Morse: No, sir, no; none at all.

The Court: Why encumber the record?

Mr. Morse: Pardon me? I thought this would be desirable only for the purpose of indicating to the Court when the witness [261] referred to Cape Blanco or Point Conception or something of that sort, where they were.

The Court: Very well, it may be admitted.

Mr. Morse: So I suggest this be marked as respondent's next in order.

Mr. McKeon: The only thought I had would be that it would be encumbering the record. I suggested to Mr. Morse that we could stipulate that if the Court wanted to refer to that chart, he could do so or call for one and we would produce it. It is a Government chart with a number on it; any of us could refer to it without it going in evidence.

Mr. Morse: Well, that is acceptable to me. The only thought I had was, it might be of some assistance to the Court.

The Court: All right.

The Clerk: Do you want it marked?

Mr. Morse: Yes, please.

The Clerk: Respondent's K.

(Whereupon Coastal chart referred to above was received in evidence and marked Respondent's Exhibit K.)

Mr. Morse: I also now offer in evidence the ex-

hibits which were marked respondent's for identification.

The Clerk: The logs?

Mr. Morse: Off the record.

(Discussion between Messrs. Morse and McKeon out of [262] hearing of the Court Reporter.)

Mr. Morse: In order to clarify the matter, I will offer in evidence all exhibits which hertofore have been marked for identification.

The Clerk: All right.

The Court: They may be admitted and marked. Any objection?

Mr. McKeon: No.

The Clerk: A and B admitted and filed in evidence.

Mr. Morse: Also that would include libelant's exhibits as well as respondents.

The Clerk: Are you speaking for libelants as well as respondents?

Mr. Morse: Yes, all exhibits.

Mr. McKeon: All exhibits may be admitted in evidence.

The Clerk: Respondents' A and B admitted and filed in evidence and libelants' 1, 2, 3 and 4 admitted and filed in evidence.

Mr. Morse: And I suggest——

Mr. McKeon: Those are the ones that have been marked for identification?

The Clerk: Yes, that's right, they are.

(Whereupon Respondents' Exhibits A and B and Libelants' Exhibits 1, 2, 3 and 4 for identification only were received in evidence.) [263]

Mr. Morse: And I suggest that for ease in reviewing the record that they be given identical exhibits in evidence numbers that they were marked with heretofore.

The Clerk: Yes.

Mr. Morse: Mr. McKeon, have you had an opportunity to verify whether shipowners was paid the \$5,750?

Mr. McKeon: Yes, that bill has been paid.

Mr. Morse: So stipulated.

I have offered in evidence the depositions of the two Coast Guard ship masters. Now——

The Court: Are they lengthy?

Mr. McKeon: No, they are not lengthy.

The Court: Read them in the record so there will be no question about it.

Mr. McKeon: Well, I am willing to have them deemed read.

The Court: I would like to have them read now.

Mr. McKeon: Very well, no objection.

The Court: Will that conclude the evidence then?

Mr. Morse: Yes, with one or two minor items which I will now clear up.

Mr. McKeon, would you be willing to stipulate that the tug Neptune was insured, carried marine insurance?

Mr. McKeon: The fact is that she did have marine insurance, your Honor, for the amount of

\$50,000, and it has [264] been paid. I don't think that has anything to do with the case, however; it is immaterial, but I don't want to oppose the fact.

Mr. Morse: Well, we have the same point of view in respect to most of this question of insurance. Now while I am on this matter of stipulating, I suggest that we stipulate that all exhibits may be withdrawn from the Court during the briefing period to aid us in briefing.

Mr. McKeon: So stipulated. Might I suggest, then—I had here on Friday the second mate of the Sea Fox, and Mr. Morse and I have talked about this. He holds a chief officer's unlimited license.

Mr. Morse: That is Captain Reichel?

Mr. McKeon: Oh, no.

Mr. Morse: I beg your pardon. Harris?

Mr. McKeon: Reichel holds a master's unlimited license and the mate, Harris, who was here Friday, holds a chief mate's unlimited ocean-going license.

The Court: Are you willing to stipulate?

Mr. Morse: I am willing to so stipulate.

Mr. McKeon: And he was mate on the Sea Fox.

The Court: Let the record so show.

Now before we go into those depositions, what is the importance of these depositions? Is it a repetition of what we have gone over before or not? [265]

Mr. Morse: They cover not only the weather conditions, the assistance——

The Court: All right, let's start with the weather conditions. Is there any question about the weather conditions?

Mr. McKeon: Well, I can't remember offhand, your Honor.

The Court: Well, aside from the deposition.

Mr. McKeon: Oh. I don't think there is any substantial difference between us. These depositions show, on the Coast Guard vessels, a recording of ten on their scale.

The Court: It would be cumulative, would it? Or wouldn't it?

Mr. Morse: Well, for example, the Sea Fox might have noted a wind force of 7 or a wind force of 8; our man might have noted a wind force of 5 or a wind force of 9 for the identical period. They have testified that their determinations of the wind force are from their own personal observation without the aid of mechanical means. So I am not making any issue myself of the differences.

The Court: Are you?

Mr. McKeon: No, your Honor.

Mr. Morse: In these minor differences, at least.

The Court: Then what is the purpose to be served here?

Mr. Morse: Well, furthermore, these depositions—and by the way, these depositions on the Coast Guard vessels are, as I understand it, from mechanical weather regulators. [266]

Mr. McKeon: I don't know; whatever they testified to.

Mr. Morse: Well, it is my belief that they are. I don't want to make a firm statement that they are.

The Court: However, if you want to make up a record, it is all right.

Mr. McKeon: Well, I think, your Honor, as long as the case is going to be briefed, it has been my experience to deem the depositions read in evidence, because we don't interpose objections as we go along to them. And in Admiralty, that has been the practice.

The Court: Well, they are all in evidence, are they? Let them be considered read. You can call the Court's attention to them in your briefs.

Mr. McKeon: Exactly.

Mr. Morse: Is that satisfactory?

Mr. McKeon: We will get into a lot of detail on the reading of those exhibits. We will be here all afternoon.

Mr. Morse: Of course in these exhibits the witnesses testify as to the services rendered not only by the Coast Guard vessels but the services they observed being rendered by other vessels; the danger involved, the danger of drifting ashore and things of that sort. So that there is material testimony in there in addition to the question of the weather.

Mr. McKeon: The Court is entitled to that testimony.

The Court: Oh, yes. There is positive testimony that one [267] of these mates was not worried at all. I think it was your client, was it?

Mr. McKeon: Yes, he was having——

Mr. Morse: That's right, the chief engineer, when they were all at anchor, said he was not afraid of drifting ashore.

The Court: All right.

Mr. Morse: That's the conclusion of the respondents' case.

Mr. McKeon: If the Court please, it has been suggested that the matter be submitted to your Honor on briefs, and——

The Court: I am going to demand an adequate record from both you gentlemen. What is the question for decision? You are talking for the record, so by the time you get your briefs in this case, it is liable to get cold. I am going to cut you down on time insofar as I can.

Mr. McKeon: We are anxious to comply with that, too, your Honor. The case, as we are contending and seeing it, is, what compensation is the Court to allow us in the way of salvage for the services rendered by these libelants and in substance we are at the mercy of the Court to compensate us.

The Court: How am I to measure that from the record?

Mr. McKeon: I think we will have to try to be helpful to the Court on the briefs. There isn't any hard and fast rule. It is in your Honor's discretion. It is not a case, in my experience, where there are analogous awards; you can't rely [268] upon hard and fast comparisons. Circumstances vary so differently that what some other Court has done in some other case is hardly any guide.

The Court: No, conditions vary.

Mr. McKeon: I was going to suggest, your Honor, that we take twenty days on our brief. The record has to be written up and we will furnish

your Honor with a copy of it, with the original record. That's agreeable?

Mr. Morse: Certainly.

Mr. McKeon: And the original is to be taxable as cost, your Honor.

Mr. Morse: That is agreeable.

Mr. McKeon: Well, we will do our utmost to get it in sooner than that.

The Court: Well, I might make this suggestion to you, then. Would ten, ten and ten give you all the time you wish?

Mr. McKeon: All right, your Honor. Let's take it ten, ten and ten.

Mr. Morse: That is satisfactory.

The Court: Well, you had better raise it now if that isn't sufficient, for you will be out here otherwise with an order extending time.

Mr. McKeon: Well, I have got to wait for the transcript, of course, your Honor.

The Court: Well, you would be surprised how efficient our [269] Reporters are.

(To the Reporter): When will this be available?

The Court Reporter: Tonight, your Honor.

The Court: Did you hear that?

Mr. McKeon: May I suggest we take 15 days from date and we will do our utmost to get it in. I have got to do something else——

The Court: What is your thought?

Mr. Morse: Ten days will be sufficient from the time I receive the brief.

Mr. McKeon: 15, 10 and 10?

The Court: 15, 10 and 5. That will be sufficient time.

Mr. McKeon: Very good.

The Court: Now that will be over to a day certain, Mr. Clerk.

The Clerk: February 26th for submission.

Certificate of Reporter

We, Official Reporters and Official Reporters pro tem, certify that the foregoing transcript of 270 pages is a true and correct transcript of the matter therein contained as reported by us and thereafter reduced to typewriting, to the best of our ability.

/s/ ELDON WHITE,
/s/ RUSSELL D. NORTON.

[Endorsed]: Filed July 5, 1951. [270]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the apostles on appeal herein as designated by the proctors for appellant:

Libel for Salvage.

Answer to Libel for Salvage.

Cross-Libel for Damages.

Answer of Shipowners & Merchants Towboat Co., Ltd., to Cross-Libel.

Answers of Respondents and Cross-Libelant, Waterman Steamship Corporation to Interrogatories Propounded by Libelants and Cross-Respondent.

Amendment to Libel.

Amendment to Answer to Libel for Salvage.

Amendment to Answer of Shipowners & Merchants Towboat Co., Ltd., to Cross-Libel and Interrogatories Propounded to Cross-Libelant.

Answers of Respondent to Interrogatories Propounded to Cross-Libelant.

Amendment to Libel.

Memorandum Opinion of Court.

Findings of Fact and Conclusions of Law of Court.

Amendments Proposed by Respondent to Findings of Fact and Conclusions of Law.

Final Decree.

Petition for Appeal.

Order Allowing Appeal.

Notice of Appeal.

Assignment of Errors.

Petition for Order Fixing Supersedeas Bond.

Cost and Supersedeas Bond on Appeal.

Citation on Appeal.

Stipulation as to Service of Papers on Appeal.

Praecipe for Apostles on Appeal.

Reporter's Transcript of Proceedings January
17 and 18, 1951.

Reporter's Transcript of Proceedings January
22, 1951.

Libelants' Exhibits 1, 2, 3, 4, 5, 6 and 7.

Respondent's Exhibits A, B, C, D, E, F, G, H, I,
J and K.

In Witness Whereof, I have hereunto set my
hand and affixed the seal of said District Court this
16th day of October, 1951.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 13135. United States Court of Appeals for the Ninth Circuit. Waterman Steamship Corporation, a Corporation, Appellant, vs. Shipowners & Merchants Towboat Co., Ltd., a Corporation, and Tug Sea Fox, Inc., a Corporation, on their own behalf and on behalf of the Master, Officers and Crew of the Tug Sea Fox, Appellees. Apostles on Appeal. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed October 17, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit
No. 13135

WATERMAN STEAMSHIP CORPORATION, a
Corporation,

Appellant,

vs.

SHIPOWNERS & MERCHANTS TOWBOAT
CO., LTD., a Corporation, and TUG SEA
FOX, INC., a Corporation, on Their Own Be-
half and on Behalf of the Master, Officers and
Crew of the Tug Sea Fox.

Appellees.

APPELLANT'S STATEMENT OF POINTS
RELIED UPON ON APPEAL

Appellant, Waterman Steamship Corporation, a corporation, hereby refers to points 1 to 21, inclusive, of its Assignment of Errors heretofore filed with the Clerk of the United States District Court in and for the Southern Division of the Northern District of California, and certified to the above-entitled Court by said Clerk as part of the record on appeal, and adopts the same as its statement of points relied upon on appeal in accordance with the provisions of Rule 19, subdivision 6, of the Rules of the above-entitled Court.

GRAHAM & MORSE,
/s/ CLARENCE G. MORSE,
Proctors for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 26, 1951.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF PARTS
OF RECORD NECESSARY FOR CONSID-
ERATION AND TO BE PRINTED

Appellant, Waterman Steamship Corporation, pursuant to Rule 19(6) of the Rules of the above-entitled Court, hereby designates as necessary for the consideration of this appeal and to be printed the following parts of the record certified to the above-entitled Court by the Clerk of the United States District Court for the Northern District of California, Southern Division:

- (1) Libel for Salvage.
- (2) Answer to Libel for Salvage.
- (3) Cross-Libel for Damages.
- (4) Answer to Cross-Libel.
- (5) Amendment to Libel.
- (6) Amendment to Answer to Libel for Salvage.
- (7) Amendment to Answer to Cross-Libel.
- (8) Memorandum Opinion.
- (9) Findings of Fact and Conclusions of Law, dated June 20, 1951.
- (10) Final Decree, dated June 20, 1951.
- (11) Report of Transcript of the Proceedings had before the Honorable Michael J. Roche on January 17, 18 and 22, 1951, including Exhibits.

(12) Petition for Appeal.

(13) Order Allowing Appeal.

(14) Notice of Appeal.

(15) Praecipe for Apostles on Appeal.

(16) Assignment of Errors.

(17) Petition for Order Fixing Supersedeas Bond.

(18) Cost and Supersedeas Bond on Appeal.

(19) Stipulation as to Service of Papers on Appeal.

(20) Appellant's Statement of Points Relied Upon Appeal filed in the above-entitled Court.

(21) Appellant's Designation of Parts of Record Necessary for Consideration and to Be Printed.

Dated October 26, 1951.

GRAHAM & MORSE,
/s/ CLARENCE G. MORSE,
Proctors for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 26, 1951.

[Title of Court of Appeals and Cause.]

STIPULATION WAIVING THE PRINTING
OF CERTAIN EXHIBITS

The appellant and appellees herein, acting by and through their respective proctors, hereby stipulate,

in pursuance of the affidavit and application filed by appellant herein, that the following exhibits appended to the reporter's transcript of proceedings had before the Honorable Michael J. Roche need not be printed:

(1) Libelants' Exhibits 1, 2, 3, 4 and 5:

Exhibit 1: Certificate of Ownership of tugs.

Exhibit 2: Photograph.

Exhibit 3: Photograph.

Exhibit 4: Photograph.

Exhibit 5: Insurance policy.

(2) Respondent's Exhibits A, B, C, D, J and K:

Exhibit A: Tug Sea Fox log.

Exhibit B: Tug Hercules log.

Exhibit C: Contract for purchase of Herald of the Morning.

Exhibit D: Contract between Waterman and Everett Pacific for conversion.

Exhibit J: A large number of weather broadcast scripts.

Exhibit K: Chart of Pacific Coast.

In addition to the foregoing, it is stipulated that the exhibits appended to the depositions of Captain Eastman and Lieutenant Schmitz, which depositions are designated Respondent's Exhibits F and G, respectively, need not be printed.

Dated October 31, 1951.

GRAHAM & MORSE,
/s/ CLARENCE G. MORSE,
Proctors for Appellant.

/s/ JAMES A. QUINBY,
/s/ LLOYD M. TWEET,
/s/ STANLEY J. COOK,
Proctors for Appellees.

[Title of Court of Appeals and Cause.]

AFFIDAVIT AND APPLICATION FOR AN
ORDER WAIVING THE PRINTING OF
CERTAIN EXHIBITS

State of California,
City and County of San Francisco—ss.

Clarence G. Morse, being first duly sworn, deposes
and says:

That he is and at all times hereinafter mentioned
was one of the proctors for the appellant above
named.

That included in the record on appeal in the
above-captioned matter are all exhibits appended to
the reporter's transcript which were introduced in
evidence in the proceedings had before the Honor-
able Michael J. Roche in the United States District
Court for the Southern Division of the Northern
District of California.

That among such exhibits are certain exhibits

which are not of a type permitting of printing in the record, but on the contrary are of such nature that they can be more readily examined and will more properly portray the pertinent evidence if examined in their original form. Such exhibits are as follows:

(1) Libelants' Exhibits 1, 2, 3, 4 and 5:

Exhibit 1: Certificate of Ownership of tugs.

Exhibit 2: Photograph.

Exhibit 3: Photograph.

Exhibit 4: Photograph.

Exhibit 5: Insurance policy.

(2) Respondent's Exhibits A, B, C, D, F, G, J and K:

Exhibit A: Tug Sea Fox log.

Exhibit B: Tug Hercules log.

Exhibit C: Contract for purchase of Herald of the Morning.

Exhibit D: Contract between Waterman and Everett Pacific for conversion.

Exhibit F: This is a deposition which should be printed but the exhibits attached to the deposition are copies of log book pages and reports and should not be printed.

Exhibit G: This is a deposition which should be printed but the exhibits attached to the

deposition are copies of log book pages and reports and should not be printed.

Exhibit J: A large number of weather broadcast scripts.

Exhibit K: Chart of Pacific Coast.

Reference to specific items in these exhibits will be called to the Court's attention in appellant's brief, so that it will be unnecessary for the Court to search through these exhibits to elicit the evidence which appellant will wish to emphasize.

Wherefore, it is respectfully requested that an order may be made herein providing that exhibits as follows: Libelants' 1, 2, 3, 4 and 5 and Respondent's A, B, C, D, J and K, and the exhibits attached to the depositions designated Respondent's Exhibits F and G, introduced in evidence, need not be printed, reproduced or copied in the transcript of record on appeal, but said exhibits will be deemed a part of the transcript of record on appeal and so considered by this Honorable Court.

/s/ CLARENCE G. MORSE.

Subscribed and sworn to before me this 31st day of October, 1951.

/s/ HELEN E. WALSH,

Notary Public.

My Commission Expires October 22, 1954.

Service acknowledged.

**ORDER WAIVING THE PRINTING OF
CERTAIN EXHIBITS**

Upon the filing and reading of the foregoing affidavit of Clarence G. Morse, one of the proctors for the above-named appellant, and upon the motion of said appellant, and good cause appearing therefor, It Is Ordered that Libelants' Exhibits 1, 2, 3, 4 and 5 and Respondent's Exhibits A, B, C, D, J and K, and the exhibits attached to the depositions designated Respondent's Exhibits F and G, need not be printed, reproduced or copied in the transcript or record on appeal, but said exhibits shall be deemed a part of the transcript and record on appeal and be so considered by this Court.

Dated San Francisco, California, Nov. 1, 1951.

/s/ WILLIAM DENMAN,

/s/ HOMER T. BONE,

/s/ WM. E. ORR,

Judges, U. S. Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed November 1, 1951.

No. 13135

**United States
Court of Appeals**
for the Ninth Circuit.

**WATERMAN STEAMSHIP CORPORATION, a
Corporation,**

Appellant,

vs.

**SHIPOWNERS & MERCHANTS TOWBOAT,
CO., LTD., a Corporation, and Tug SEA
FOX, INC., a Corporation, on Their Own Be-
half and on Behalf of the Master, Officers and
Crew of the Tug Sea Fox,**

Appellees.

**Supplemental
Apostles on Appeal**

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

FILED

JAN - 9 1952

No. 13135

**United States
Court of Appeals**
for the Ninth Circuit.

**WATERMAN STEAMSHIP CORPORATION, a
Corporation,**

Appellant,

vs.

**SHIPOWNERS & MERCHANTS TOWBOAT,
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**Appeal from the United States District Court for the
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Southern Division.**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Southern Division of the United States
District Court for the Northern District of
California

SHIPOWNERS & MERCHANTS TOWBOAT
CO., LTD., a Corporation, on Its Own Behalf
and on Behalf of the Master, Officers and Crew
of the Tug SEA FOX,

Libelants,

vs.

WATERMAN STEAMSHIP CORPORATION, a
Corporation,

Respondents

In Admiralty—No. 25539-E

WATERMAN STEAMSHIP CORPORATION, a
Corporation,

Cross-Libelant,

vs.

SHIPOWNERS & MERCHANTS TOWBOAT
CO., LTD., a Corporation,

Cross-Respondent.

ANSWERS OF RESPONDENT AND CROSS-LIBELANT WATERMAN STEAMSHIP CORPORATION TO INTERROGATORIES PROPOUNDED BY LIBELANTS AND CROSS-RESPONDENT

Now Comes the respondent and cross-libelant Waterman Steamship Corporation, a corporation, by and through its proctors, Clarence G. Morse and Graham & Morse, and answers the interrogatories propounded by libelants and cross-respondents, Shipowners & Merchants Towboat Co., Ltd., a corporation, as follows:

Interrogatory 1.

Answer: (a) The towing wire transferred to the Sea Fox from the Sea Prince was used and defective.

(b) The towing engine of the Sea Fox was unseaworthy and defective.

(c) The Sea Fox was insufficiently powered for towage of the Herald of the Morning for that season and area.

Interrogatory 2.

Answer: (a) They failed to navigate in a manner to keep the Herald of the Morning astern of the Sea Fox but permitted the tow to yaw from side to side.

(b) In failing to keep in touch with the Weather Bureau to check on weather forecasts of approaching weather.

(c) In failing to put into a port of refuge when the weather began to worsen.

(d) In failing to call for assistance when, off the Columbia River, they realized they could not handle the Herald of the Morning alone in even moderately heavy weather.

(e) In failing to regularly slacken off on the towing wire in order to minimize wear and tear on the wire.

(f) In failing to have aboard the Sea Fox personnel who were experienced in towing large dead ships at sea.

Interrogatory 3.

Answer: Libelant.

Interrogatory 4.

Answer: The Neptune was negligent in maneuvering in that she should have come to the bow of the Herald of the Morning from forward of and to the lee side of the stem of the Herald of the Morning and in permitting the Neptune to ride too close to the stem of the Herald of the Morning.

Interrogatory 5.

Answer: Yes.

Interrogatory 6.

Answer: Waterman Steamship Corporation and during the tow Pacific Car & Foundry Company.

Interrogatory 7.

Answer: Yes, but only as provided in said survey report.

GRAHAM & MORSE,
/s/ CLARENCE G. MORSE,

Proctors for Respondent and
Cross-Libelant.

Receipt of a copy of the foregoing Answers to Interrogatories acknowledged.

State of California,
City and County of San Francisco—ss.

Fred J. Foster, being first duly sworn, deposes and says:

That he is an officer, to wit, Assistant Secretary, of Sudden & Christenson, Inc., duly authorized agent of Waterman Steamship Corporation, respondent and cross-libelant in the above-captioned matter, and as such is authorized and empowered to make and subscribe oaths sworn on behalf of respondent and cross-libelant; that he has read the

foregoing answers to interrogatories, knows the contents thereof, and that the same are true to the best of his knowledge, information and belief.

/s/ FRED J. FOSTER.

Subscribed and sworn to before me this 16th day of May, 1950.

[Seal] /s/ LUCIE M. REINCKE,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires November 19, 1950.

[Endorsed]: Filed May 17, 1950.

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES
PROPOUNDED TO CROSS-LIBELANT

1. Addendum dated November 1, 1948, to Policy No. 48-1299, American Marine Hull Insurance Syndicate, provided in part:

It is further agreed the trip in tow rates are as follows:

Marine— $1\frac{1}{8}\%$ (with release of tug)

1% (no release of tug)

War and strikes, etc., $2\frac{1}{2}\%$.

All other terms and conditions remaining unchanged.

2. Premium of $1\frac{1}{8}\%$ was paid to the insurers for the voyage in tow from "present location within

San Francisco Harbor limits to Everett Pacific Shipbuilding and Drydock Company, Everett, Washington.”

3. No answer required.

4. Contract No. MCc 61461 dated as of October 26, 1948, between United States Maritime Commission (therein called “Commission”), Pacific Car & Foundry Company doing business as Everett Pacific Shipbuilding and Drydock Company (therein called “Contractor”), and Waterman Steamship Corporation (therein called “Owner”), provided in part:

“Article 25: Liability. (a) In the event the work to be performed by the Contractor hereunder is such that delivery of the vessel will be made to the Contractor at the Shipyard, the Contractor shall be liable to the Owner for any damage or loss to the vessel, its machinery, supplies, apparel, and appurtenances or materials, equipment and supplies furnished by the Owner, occurring during the performance of the work covered hereby and resulting from the negligence of the Contractor, its servants, subcontractors, agents, or employees, which liability shall be limited to the sum of \$300,000.00.

“(b) In the event the work to be performed by the Contractor hereunder includes transfer of the vessel by or on behalf of the Contractor to the Shipyard, the Contractor shall be liable to the Owner for any damage or loss to the vessel, its machinery, supplies, apparel, and

appurtenances or material, equipment and supplies furnished by the Owner, occurring during the performance of the work covered hereby and resulting from negligence of the Contractor, its servants, subcontractors, agents or employees, which liability shall be limited to the sum of \$300,000.00, provided however, that the Contractor shall not be liable to the Owner for any damage or loss to the vessel, its machinery, supplies, apparel, and appurtenances, or materials, equipment and supplies furnished by the Owner, resulting from the negligence of the Contractor, its servants, subcontractors, agents, or employees and occurring during the transfer of the vessel to the Shipyard by or on behalf of the Contractor from the point of original delivery of the vessel to the Contractor.”

5. The towage contract between Shipowners & Merchants Towboat Co., Ltd., and Everett Pacific Shipbuilding & Drydock Company, dated November 1, 1948, provided:

“By endorsement thereon or otherwise and without any right of subrogation against it, First Party shall be made an additional assured in Second Party’s insurance policies covering the tow, including Hull P & I and Cargo, during the towage service, and, if Second Party does not so add First Party as an additional assured or fails to provide for the aforesaid waiver of subrogation or fails to insure said tow, then Second Party agrees to be the insurer

thereof for both parties and expressly agrees to assume the risk of loss of or damage to the tow and cargo and any liability of First Party therefor which could be covered by usual and suitable forms of marine insurance policies.”

6. No. The understanding reached was between Waterman and the U. S. Maritime Commission which required Waterman to cover insurance during movement of the vessel by Pacific Car & Foundry Company, who was to be named as co-insured, and the allowance against the purchase price for Waterman's expenses was revised to include the insurance costs.

7. Waterman has no knowledge but is advised by underwriters they did not sight the towage contract before voyage began.

8. Pertinent particulars of towage arrangements and contract were furnished by Waterman to its brokers, who arranged the insurance. Waterman has no knowledge of what transpired between the brokers and the underwriters.

GRAHAM & MORSE,
/s/ CLARENCE G. MORSE,

Proctors for Respondent and Cross-Libellant,
Waterman Steamship Corporation.

Receipt of a copy of the foregoing Answers to Interrogatories acknowledged.

State of California,
City and County of San Francisco—ss.

Clarence G. Morse, being first duly sworn, deposes and says:

That he is of counsel for Respondent and Cross-Libellant, Waterman Steamship Corporation, in the above-captioned matter; that there are no officers of the said Respondent and Cross-Libellant within this District, and therefore he makes this affidavit on its behalf; that he has read the foregoing Answers to Interrogatories, knows the contents thereof, and that the same are true to the best of his knowledge, information and belief.

/s/ CLARENCE G. MORSE.

Subscribed and sworn to before me this 16th day of January, 1951.

[Seal] /s/ HELEN E. WALSH,
Notary Public in and for the City & County of
San Francisco, State of California.

My Commission expires October 22, 1954.

[Endorsed]: Filed January 22, 1951.

RESPONDENT'S EXHIBIT F

In the Southern District of the United States District Court for the Northern District of California

In Admiralty No. 25538-H

PUGET SOUND TUG & BARGE COMPANY, a Corporation, and CARY-DAVIS TUG & BARGE COMPANY, a Corporation,

Libelants,

vs.

WATERMAN STEAMSHIP CORPORATION, a Corporation,

Respondent,

vs.

SHIPOWNERS & MERCHANTS TOWBOAT CO., LTD.,

Third Party Respondent.

and

In Admiralty No. 25539-E

SHIPOWNERS & MERCHANTS TOWBOAT CO., LTD., a Corporation, on Its Own Behalf and on Behalf of the Master, Officers and Crew of the Tug SEA FOX,

Libelants,

vs.

WATERMAN STEAMSHIP CORPORATION, a Corporation,

Respondent,

Respondent's Exhibit F—(Continued)

WATERMAN STEAMSHIP CORPORATION, a
Corporation,

Cross-Libelant,

vs.

SHIPOWNERS & MERCHANTS TOWBOAT
CO., LTD., a Corporation,

Cross-Libelant.

Thursday, November 30, 1950—10 A.M.

Appearances:

EUGENE S. GILLIGAN, ESQ.,

120 Broadway, New York, New York,

Of Counsel.

GRAHAM and MORSE,

Counsel,

Appearing for the Waterman Steam-
ship Corporation.

FREDERIC CONGER, ESQ., of

BURLINGHAM, VEEDER, CLARK AND
HOPPER,

27 William Street, New York, New York,
Of Counsel.

McKEON and COLBY,

Counsel,

Appearing for Puget Sound Tug &
Barge Company and Shipowners &
Merchants Towboat Co.

Respondent's Exhibit F—(Continued)

Deposition of Captain F. G. Eastman, U. S. C. G., a witness of lawful age, taken on behalf of Waterman Steamship Corporation, in the above-entitled causes pending in the Southern District of the United States District Court for the Northern District of California, pursuant to agreement, before Esther M. Midthun, a notary public in and for the District of Columbia, in Room 327 Munsey Building, Washington, D. C., on the 30th day of November, 1950.

Mr. Gilligan: Counsel enter the same stipulation as made between them on the deposition of Lieutenant Frank C. Schmitz, at Groton, Connecticut. [2*]

CAPTAIN F. G. EASTMAN, U. S. C. G.

a witness called in behalf of Waterman Steamship Corporation, being of lawful age, and being first duly sworn by the notary public in the above causes, testified on his oath as follows:

Direct Examination

By Mr. Gilligan:

Q. On November 17, 18, and 19, 1948, were you Commanding Officer of the United States Coast Guard Cutter Winona? A. Yes, I was.

Q. What was your rank then?

A. I was a Commander then.

Q. What is your present rank and duty?

Respondent's Exhibit F—(Continued)

(Deposition of Captain F. G. Eastman.)

A. Rank: Captain, assigned to Coast Guard Headquarters, Washington, D. C.

Q. What is your place of residence?

A. 1514 Timber Lane, Falls Church, Virginia.

Q. In November, 1948, about what length sea service had you had then?

A. I had had a total of about 20 years' service, about 14 of which was sea service.

Q. On the dates I mentioned, did the Winona render assistance to the Herald of the Morning and the Tug Sea Fox? A. Yes.

Q. In instances where a Coast Guard vessel renders assistance, is there any practice in connection with making [3] reports on such assistance?

A. Yes, we always make a report of assistance, Form NCG-2628, to headquarters.

Q. In this instance, did you make a report of assistance to Coast Guard Headquarters?

A. Yes.

Q. I show you a photostatic sheet and ask if you can identify it.

A. Yes. This is a report of the assistance of the Coast Guard Cutter Winona in the Herald of the Morning case.

Q. Is that report signed by you?

A. Yes, it is.

Mr. Gilligan: I offer the report in evidence and request that it be marked Exhibit Winona "A."

Mr. Conger: I object to its introduction.

Respondent's Exhibit F—(Continued)

(Deposition of Captain F. G. Eastman.)

(The photostatic copy of report of assistance of the Coast Guard Cutter Winona in the Herald of the Morning case, marked Winona Exhibit "A," was retained in possession of counsel.)

Q. (By Mr. Gilligan): Can you identify the four photostatic sheets which I hand you?

A. Yes. This is the photostatic copy of the official log of the Winona for the 17th and 18th of November, 1948.

Q. It also covers the 19th, does it not?

A. 17th, 18th, and 19th of November, 1948. [4]

Q. And that official log is one that was kept in the regular operation of the cutter?

A. Yes, it is.

Mr. Gilligan: I offer the four log sheets in evidence and request that they be marked Exhibits Winona B-1 to B-4.

Mr. Conger: I object to the introduction in evidence of these logs.

(The photostatic copies of four log sheets of the Winona for November 17, 18, and 19, 1948, marked Winona Exhibits B-1, B-2, B-3, and B-4, respectively, were retained in possession of counsel.)

Q. (By Mr. Gilligan): What type vessel was the Winona?

A. The Winona is a cruising cutter 255 feet long with 4,000 horsepower.

Respondent's Exhibit F—(Continued)

(Deposition of Captain F. G. Eastman.)

Q. Was she single screw or twin screw?

A. Single screw.

Q. Did you proceed to the scene of the *Herald of the Morning* in response to dispatches from Coast Guard Headquarters?

A. Yes. Orders were issued to us from the 13th Coast Guard District in Seattle to proceed to the *Herald of the Morning* and assist the *Balsam* as necessary.

Q. You at the time were en route from where and bound where?

A. The *Winona* was en route from Port Angeles, Washington, [5] to an ocean station, Fox, which was half way between San Francisco and Honolulu.

Q. What time did you arrive at the scene of the *Herald of the Morning*?

A. We arrived at the scene at 0428 on the 17th of November, 1948.

Q. What did you find the situation to be on your arrival?

A. The *Herald of the Morning* was anchored with the two anchors down in about 33 fathoms of water. The wind was force 5 Beaufort scale, and the sea I would say was about 6.

Q. Were there any other vessels on the scene?

A. Yes. The Coast Guard Cutter *Balsam* and the commercial tug *Sea Fox* were standing by.

Q. After your arrival at 0400, will you relate what was done, if anything, by the *Winona* in that

Respondent's Exhibit F—(Continued)

(Deposition of Captain F. G. Eastman.)

succeeding watch and the next succeeding watch?

A. We stood by the *Herald of the Morning* to size the situation up and we communicated by radio with the tug *Sea Fox* and the *Balsam* to determine what their plans were and to decide what we should do. The *Sea Fox* stated that they could take the *Herald of the Morning* in tow but that they had no towing hawser, as they had broken their hawser, and the *Balsam* was also in the same position, in that their towing hawser had been parted previously. I sent a message to the [6] Coast Guard District in Seattle stating that the *Herald of the Morning* was in no immediate danger and stated that I could loan the *Sea Fox* our hawser and assist them in placing it on board, so that we could proceed to our ocean station in accordance with our original assignment.

The Seattle District said that I could loan the hawser if in my judgment it seemed to be the proper thing under the circumstances.

I called the *Sea Fox* by radio and told them that I would place our 12-inch hawser on the *Herald of the Morning* and give the other end to the *Sea Fox* so that they would be in a position to take her in tow.

Q. Was that done?

A. Yes. At 10:18 the *Winona* anchored in 33 fathoms of water ahead of the *Herald of the Morning*, and we shot a line to the *Herald of the Morning* with a line-throwing gun and passed one end of

Respondent's Exhibit F—(Continued)

(Deposition of Captain F. G. Eastman.)

our 12-inch hawser to them. Then we called the Sea Fox over and shot a line to them and passed the other end of the same hawser to the Sea Fox.

Q. When the Winona shot a line as the first step in passing her 12-inch hawser to the Herald of the Morning, what was the position of the Winona with reference to the Herald of the Morning?

A. We were anchored right ahead of them, that is with head to the sea and wind and about 50 yards between our stern [7] and the bow of the Herald of the Morning.

Q. Were you in the same position or a different position when you passed the other end of the hawser to the Sea Fox?

A. We maintained our anchored position while passing the hawser to the Sea Fox and did not move until the Sea Fox had the end secured on board.

Q. When was the operation of passing the hawser completed, approximately?

A. It was completed about noon, shortly after noon, on the 17th of November.

Q. Will you describe the conditions of weather and sea during that operation?

A. At noon the wind was force 3 west and the sea was force 4 from the west—or number 4, not force 4.

Q. In knots, will you state what force 3 wind would be or is?

A. Force 3 wind is about 28 knots an hour, I think. You don't have any nautical book here, I

Respondent's Exhibit F—(Continued)

(Deposition of Captain F. G. Eastman.)

guess, from which I could refresh my memory. I should have brought one with me, I guess. I think that is about right, about 28 knots an hour wind.

Q. Apart from defining a force 3 wind, do you have a recollection of about the force of the wind when that operation went on? [8]

A. The wind had modulated considerably during the morning, but there was a heavy swell running from the storm which had passed.

Q. In Coast Guard usage, the sea is defined by numbers ranging from 1 to 9, is it?

A. I think it is 1 to 10. I believe the sea is 1 to 10 and the wind is 1 to 9.

Q. And the sea as described by your log as the numeral 4 would be what type of sea?

A. Those are heavy swells. I would say those swells were 30 feet between height of crest and valley.

Mr. Conger: Was this at the time the hawser passed?

Mr. Gilligan: That the hawser passed.

Q. (By Mr. Gilligan): Would you be able to describe in a general way the type of seas which would be represented by the numerals 3 down to 2 down to 1? I am trying to get just what the starting point 1 is, to move it up through 2, 3, and up to 4.

A. One is slight sea, perhaps eight feet between the crest and the valley, 2 is about 12 feet high, and

Respondent's Exhibit F—(Continued)

(Deposition of Captain F. G. Eastman.)

3 about 18 feet high.

Q. And when you say "high," Captain, you mean the distance from the trough to the height of the crest?

A. Yes.

Q. It doesn't refer to the height of the swell itself, [9] I mean from the horizontal to the top of the crest?

A. You mean from the mid point to the top?

(Discussion off the record followed.)

A. (Continuing): I could just qualify that now by saying that it is possible that a number 4 sea is more nearly 25 feet high.

Q. After the hawser had been secured between the Herald of the Morning and the Sea Fox, did the Balsam remain at the scene during the 1200-1600 watch?

A. The Balsam was released by me by radio to return survivors of the sunken tug Neptune to Astoria.

Q. What time did she leave the scene?

A. She left the scene at 1400.

Q. How long did you remain at the scene after 1400 on the 17th of November?

A. We stood by the Herald of the Morning and Sea Fox until the Balsam returned at 2245. Of course, we didn't really leave until 0310 I notice, that is, we had to get the Balsam briefed on the conditions before we left.

Respondent's Exhibit F—(Continued)

(Deposition of Captain F. G. Eastman.)

Q. And when you spoke of 0310, that is 0310 on the 18th of November?

A. The 18th of November.

Q. From the time the towing hawser had been secured from the Sea Fox to the Herald of the Morning around 1200 on the 17th until you left at 0310 on the 18th, would you generally [10] describe what the weather conditions and sea conditions had been?

A. The weather and sea were improving gradually, until the evening of the 17th, when the wind shifted to southsoutheast and began to increase somewhat.

Q. Will you relate what the circumstances were attending your departure from the scene?

A. When we departed at 0310 on the 18th the Balsam was standing by the Sea Fox and the Herald of the Morning. The Sea Fox had the 12-inch hawser and was prepared to take the Herald of the Morning in tow. The Herald of the Morning was anchored with one anchor down. She had slipped her second anchor when we placed the hawser on the Sea Fox.

Q. Did you leave the scene on orders from the Coast Guard headquarters?

A. The Seattle District gave me authority to leave when I considered that the Balsam and the Sea Fox could handle the situation, and I considered that to be the case when we left.

Respondent's Exhibit F—(Continued)

(Deposition of Captain F. G. Eastman.)

Q. So you then proceeded on your original mission?
A. Yes.

Mr. Gilligan: Your witness.

Cross-Examination

By Mr. Conger:

Q. You weren't there when the tug Hercules came along [11] later on, were you?
A. No.

Q. You don't know what the conditions were after you left?

A. The Sea Fox told me by radio that there was another tug named the Hercules that was en route, and the District confirmed that fact before I left.

Q. Did that enter into your consideration of believing it to be safe to leave the Balsam and the Sea Fox with another tug coming to the assistance? Did that have something to do with the decision to leave?

A. Well, I considered the situation was adequately taken care of with the vessels at hand.

Q. At that particular time, you mean?

A. At that time, yes.

Q. When you first got your report of the District—was it called the District Office?

A. District Commander.

Q. District Commander—the weather at that time or the wind was force 9, was it not? If you look at the records——

A. We don't have that report here.

Respondent's Exhibit F—(Continued)

(Deposition of Captain F. G. Eastman.)

Q. Is it your recollection of the time that the wind was blowing a gale, at the time you first got that request to go out to the assistance of the *Herald of the Morning*?

A. When we received the first orders to go, we were in [12] the Strait of Juan de Fuca, and the wind at that time was about force 4, and I increased the speed to 17 knots. When we arrived off the entrance to the Strait in the open sea the wind and sea had increased to such an extent that I had to slow down to 12 knots to keep from taking green seas over the bow.

I don't think the wind was ever force 9; as far as I am concerned, it wasn't. I can tell you what I think it was.

Q. Your position is it wasn't; you don't think it was as high as that? A. No.

Q. Do you know what that message was that the *Balsam* had sent to the headquarters?

Didn't it have something to do with there was danger of the *Herald of the Morning* going aground if she continued to drift, going ashore?

As I understand it, there was some figuring in the message as to about where she might fetch up in case she continued to drift?

Do you know about that?

A. The first intimation we received that the *Herald of the Morning* was in trouble was a message

Respondent's Exhibit F—(Continued)

(Deposition of Captain F. G. Eastman.)

sent by the Balsam to Coast Guard District, Seattle, for our information. That message stated that the position of the Herald of the Morning was such that she might drag anchor. [13]

(Discussion off the record followed.)

Q. There was a definite message that was in writing that was sent that you saw at one time or was received?

A. Yes, and when I arrived on the scene I was surprised that the situation was as good as it was.

Q. As I understand it, you didn't maneuver in close with your vessel to pass this 12-inch tow line, but used the Lyle gun to shoot both ends, one end to the Herald of the Morning and the other end to the Sea Fox.

A. We maneuvered in fairly close. That is, 50 yards isn't very far in a heavy sea.

Q. The sea was then what force?

A. The sea was about force 4 and the wind around 5.

Q. This hawser you had, that was a Manila hawser, was it not?

A. A Manila hawser.

Q. Did you have any other hawser beside that Manila hawser?

A. Yes, we had an eight-inch Manila hawser and a 1¼-inch wire hawser in addition.

Q. Do you know what the Sea Fox had before, what hawser? They had a wire, did they not?

Respondent's Exhibit F—(Continued)

(Deposition of Captain F. G. Eastman.)

A. The Captain of the Sea Fox told me that they had a wire which broke.

Q. Do you know what thickness that wire was? Did you [14] see it on the vessel?

A. I thought that it was $1\frac{1}{4}$ -inch wire similar to the wire that we had, but I am not sure.

Q. At the time that you arrived, the Balsam didn't have any more hawsers to help out with, did she?

A. No, they told me they had an eight-inch hawser which had parted and wasn't long enough for further towing.

Q. This $1\frac{1}{2}$ -inch wire that you said you had on the Winona—

A. I don't know whether I should explain between the measure. A wire is measured in diameter.

Q. In diameter.

A. And the Manila hawser is measured in circumference and the wire is measured in diameter, so the $1\frac{1}{4}$ -inch diameter wire is a pretty husky piece of steel wire.

Q. How long was that $1\frac{1}{2}$ -inch wire that you had? A. I think it was about 100 fathoms.

Q. How about this Manila hawser that you shot out?

A. That twelve-inch Manila hawser, I think that was 300 fathoms.

Q. In view of the sea conditions, your wire was a little short for that job, was it not?

Respondent's Exhibit F—(Continued)

(Deposition of Captain F. G. Eastman.)

A. Yes. We do not have a towing machine, and in my estimation a Manila hawser that is long gives you a catenary which acts as a cushioning effect when towing in a seaway. [15]

Q. If you have a towing machine, then you can use your wire to better effect, as I understand it?

A. A wire is probably a suitable towing equipment with a towing machine.

(Discussion off the record followed.)

Q. I think I saw somewhere here something or other in my notes about one of these reports that said that the Herald of the Morning had two anchors down.

My information is that there was one anchor down and the second anchor was unshipped on deck and it was not down.

Would you be positive in your recollection that there were two anchors down—actually down, that is?

A. Yes, I would, because of this: When we passed the hawser to the Herald of the Morning, they had two anchors down and I tried to get the message to them by voice that they were to leave their anchors down until the Sea Fox actually had the cable or the hawser fast on board, but while we were passing the hawser to the Sea Fox the Herald of the Morning let go one of their anchor chains so that it ran out through the hawse pipe, and I

Respondent's Exhibit F—(Continued)

(Deposition of Captain F. G. Eastman.)

distinctly remember that because it caused me considerable alarm that the *Herald of the Morning* might drift, and in the conditions prevailing it would have been a very embarrassing situation, since the *Sea Fox* did not have the hawser secured at that time.

Q. It might have been an anchor from one of the other [16] vessels that you saw two down, or it might have been an anchor chain from some other vessel besides the *Herald of the Morning*?

A. We. We could see the *Herald of the Morning* stern and the anchor, or the chain, was right there.

There is no doubt in my mind that she had two anchors.

Q. As I say, my information is that one of the anchors was unshipped, and do you definitely deny that it was unshipped rather than that it was down?

A. I don't know what the *Herald of the Morning* had on deck.

Sometimes they have what is called a stream anchor on deck, which is an extra anchor above the two anchors usually carried in the hawse pipes. If they had an anchor on deck, it is my opinion that that is what that was.

(Discussion off the record followed.)

A. (Continuing): Sometimes a ship will put a chain out without any anchor on it, but it certainly

Respondent's Exhibit F—(Continued)

(Deposition of Captain F. G. Eastman.)

looked to me as if there were two chains with two anchors on them from the way the ship swung back and forth in the wind and sea and took a strain on each one.

Q. Was the Herald of the Morning, at the time you came up to her on the 17th, outside the 30-fathom circle, or whatever you call it?

A. She was just beyond the 30-fathom curve, and we [17] logged our depth as 33 fathoms when alongside of her.

Q. Are you familiar with those tugs, the Hercules and the Neptune before she sank?

A. Yes. I went down and looked at the Neptune afterwards in Seattle, just as a matter of interest, to see how large a ship she was.

Q. Did they raise it?

A. Excuse me, no, I don't say the Neptune. I mean the Hercules.

Q. They can work close to these vessels a little better than your larger Winona or the Balsam, I believe, can they not?

A. Yes. Those tugs are handy ships and should be able to maneuver fairly close.

Q. That is what they were built for more or less, were they not, that kind of work?

A. Yes.

Mr. Conger: That is all.

Respondent's Exhibit F—(Continued)

(Deposition of Captain F. G. Eastman.)

Redirect Examination

By Mr. Gilligan:

Q. In answering one of Mr. Conger's questions which related to the wind force at the time you passed your hawser to the Herald of the Morning, I am not just sure what answer you meant to give.

Would you kindly refer to your log again and tell us what [18] the wind force was during that operation?

A. The wind at 0900 was logged as 4, and at 1000 as 3. I can answer it that way.

Q. And at eleven?

A. And at eleven, force 3.

Q. And also at noon?

A. At noon, force 3.

Q. That was during the period when the hawser was being passed? A. Yes.

Recross-Examination

By Mr. Conger:

Q. One other question here. I notice in this report of assistance of the Winona's that they have the nature of the casualty: "Tug's towing hawser parted." That refers to the Sea Fox, does it?

A. Yes, it does.

Q. And then underneath it says "Cause," and the answer is "Heavy seas"? A. Yes.

Respondent's Exhibit F—(Continued)

(Deposition of Captain F. G. Eastman.)

Q. And was that the information that you received from the Balsam?

A. The Sea Fox told me by radio that their towing machine was broken down and that contributed to the breaking of their towing wire. [19]

Q. But when you made this report, was it based on what you received from the District Commander or from the Balsam's report, or was this made up afterwards?

A. We make this report up from the information that we have ourselves and that goes to the District and then to Headquarters here, and we don't have anything from anyone else necessarily except by radio exchange that we did on the scene.

Mr. Conger: That is all.

Mr. Gilligan: That is all.

(Witness excused.)

(The signature of the witness was waived by agreement between counsel.)

Mr. Gilligan: It is agreed that the exhibits offered in evidence may be retained by examining counsel, in reference to copies of record, to make copies for the Court and opposing counsel.

(The taking of the above deposition was concluded at 11:10 a.m., November 30, 1950.)

[Endorsed]: Filed January 22, 1951. [20]

RESPONDENT'S EXHIBIT G

Deposition of Lt. Frank C. Schmitz, taken on behalf of the Waterman Steamship Corporation, at the United States Coast Guard Station, New London, Connecticut, on November 28, 1950, at 1:00 o'clock p.m., pursuant to agreement of counsel.

[Title of District Court and Causes.]

Appearances:

MESSRS. GRAHAM & MORSE,

Proctors for Waterman Steamship Corporation, by

MESSRS. KIRLIN, CAMPBELL, HICKOX
& KEATING,

(EUGENE F. GILLIGAN, ESQ.)

MESSRS. McKEON & COLBY,

Proctors for Puget Sound Tug & Barge Company, Cary-Davis Tug & Barge Company and Shipowners & Merchants Towboat Co., Ltd., by

MESSRS. BURLINGHAM, VEEDER,

CLARK & HOPPER,

(FREDERIC CONGER, ESQ.)

MR. SEYMOUR MANHEIMER,

Notary Public of the State of Connecticut.

It Is Stipulated and Agreed by and between counsel for the respective parties that the signing, sealing, certification and filing of the within deposition

Respondent's Exhibit G—(Continued)

are waived; it is further stipulated that all objections except as to the form of the questions are reserved to the trial; it is further stipulated that stenographer's fees are taxable subject to the practice in the district in which these suits are pending and the agreement of counsel of record; it [2*] is further agreed that this deposition may be used in the two causes in which it is taken and accordingly the deposition is entitled in both causes; it is further agreed that the original of the deposition may be delivered to the examining counsel for transmission to counsel for Waterman Steamship Corporation.

LT. FRANK C. SCHMITZ

called as a witness on behalf of the Waterman Steamship Corporation, being first duly sworn by the Notary Public, testified as follows:

Direct Examination

By Mr. Gilligan:

Q. Were you commanding officer of the United States Coast Guard Cutter Balsam during November, 1948? A. Yes.

Q. What was your rank?

A. Lieutenant, United States Coast Guard.

Q. How long had you commanded the Balsam?

A. I would say approximately six months.

Q. At that time about how long had you been commissioned as a lieutenant?

*Page numbering appearing at top of page of original Certified Transcript of Record.

Respondent's Exhibit G—(Continued)

(Deposition of Lt. Frank C. Schmitz.)

A. Since July, 1944.

Q. At that time how much sea experience had you had?

A. You mean actually at sea or duties connected with the sea?

Q. Duties connected with the sea.

A. I would [3] say ten years.

Q. Would you give a description of the Cutter Balsam in respect of her general dimensions or motive power?

A. She is a 180 foot Coast Guard Tender Class Cutter; her beam, I believe, was 36 feet; her motive power was Diesel electric, single screw, a 9 foot 6 inch propeller, fitted with towing bitts and towing rail on her fantail.

Q. On November 14, 1948, where was the Balsam stationed?

A. At Pier 3, port docks, Astoria, Oregon.

Q. On that date did she leave Astoria to proceed to sea to render assistance to a vessel at sea?

A. Yes.

Q. To what vessel did you proceed?

A. The Tug Sea Fox with the C-2 hull, Herald of the Morning in tow.

Q. Would you kindly state the time of your departure and the time and position of your arrival at the site where those vessels were?

A. We departed Astoria en route to the assistance of the aforementioned vessels at 1715, 14 No-

Respondent's Exhibit G—(Continued)

(Deposition of Lt. Frank C. Schmitz.)

vember, 1948, and we arrived in their vicinity at 2030 that evening.

Q. What was the approximate position at which you found the vessels?

A. Seventeen miles bearing 230 degrees true from Columbia River Light Ship.

Q. Had you been informed what the occasion was for [4] request for your assistance?

A. I had.

Q. What was that advice?

A. That the Tug Sea Fox with the Herald of the Morning in tow had her towing engine disabled.

Q. On arrival at the scene did you speak either vessel?

A. I did.

Q. Which one or was it both?

A. We first spoke the Tug Sea Fox by radio-telephone; following that we went close alongside the Herald of the Morning and spoke to her crew by megaphone.

Q. And generally, what was the situation in which those vessels were as you observed it or as it was told you either by the Sea Fox or the crew of the Herald of the Morning?

A. The Sea Fox's towing engine was disabled; the tow line had been re-secured to the Sea Fox's towing bitts. However, this was a poor arrangement and wasn't expected to last for long.

Q. At what approximate time did your assistance

Respondent's Exhibit G—(Continued)

(Deposition of Lt. Frank C. Schmitz.)

to the Herald of the Morning and the Sea Fox terminate?

A. At 1005, 19 November, 1948.

Q. In what approximate location were the vessels then?

A. In the Straits of Juan de Fuca off Port Angeles, Washington.

Q. I show you ten photostatic sheets and I ask you if you can identify them? A. I can. [5]

Q. And what are they?

A. They are the log of the Coast Guard Cutter Balsam for the period 14 November through 19 November.

Q. And do these log sheets contain watch by watch entries made in regular course over those dates? A. They do.

Q. Do those log sheets bear your signature?

A. They do.

Mr. Gilligan: I offer the log sheets identified by the witness in evidence.

Mr. Conger: I should object to their introduction at this time. While they bear his signature it does not appear that those were all made by him.

Mr. Gilligan: I suggest that they be marked "Exhibit Balsam A-1 through A-10."

(The log sheets above referred to were marked Exhibit Balsam A-1 through A-10, November 28, 1950, I. H. S.)

Respondent's Exhibit G—(Continued)

(Deposition of Lt. Frank C. Schmitz.)

Mr. Gilligan: I understand it is agreeable that I may retain the log sheets of the *Balsam* offered in evidence for transmission to the proctors of record for Waterman Steamship Corporation for the purpose of making additional copies to be supplied the court and counsel for the salvors.

Q. After the rendition of assistance to the [6] vessels in distress, is there any practice in the Coast Guard concerning the formulating of reports concerning those activities?

A. Yes; it is required that a report of assistance be made and forwarded to the commandant via the chain of command.

Q. I show you two sets of documents, each headed "Report of Assistance," one bearing the serial number 13-49 and the other, serial number 14-49 and I ask you if you can identify those documents? A. I can.

Q. And what are they, please?

A. The CGC *Balsam*'s reports of assistance involving the Tug *Neptune* and the Tug *Sea Fox* and the *Herald of the Morning*.

Q. Who prepared the reports? I mean in the sense of authorship?

A. Lieutenant Jg. J. E. Murray, navigator of the Coast Guard Cutter *Balsam*.

Q. Who signed them?

A. Lt. Murray and myself.

Respondent's Exhibit G—(Continued)

(Deposition of Lt. Frank C. Schmitz.)

Q. What did you intend your signature on the reports to signify?

A. The correctness and completeness of the facts reported therein.

Mr. Gilligan: I offer those reports in evidence and request that they be marked respectively Exhibits Balsam B, and C.

Mr. Conger: Same objection as in the case of the logs.

(Reports of assistance above referred to were [7] marked respectively Exhibits Balsam B and C, November 28, 1950, I. H. S.)

Q. There came a time later in your attendance at the scene when the situation as it was when you arrived changed and I refer to the time that the towing line between the Sea Fox and the Herald of the Morning parted.

Will you state when that occurred?

A. The tow line parted at 0040, 16 November.

Q. Up to that time, from the time of your arrival, will you state whether or not any progress had been made in the towage of the Herald of the Morning or just what the situation might have been?

A. At the time we arrived at the scene of the two ships the towing engine had become disabled and the towing cable had been re-secured to the towing bitts. The Tug Sea Fox was endeavoring to head into the sea and wasn't attempting to make

Respondent's Exhibit G—(Continued)

(Deposition of Lt. Frank C. Schmitz.)

any progress up the coast. As I recall, she was steering generally a southwesterly course into the weather, sea and wind.

Q. From the time of your arrival until the parting of the towing line of the Sea Fox, would you give a brief resume, in a general way of the weather conditions as to wind and state of the sea?

A. Well, the weather was cloudy and overcast with occasional rain; the wind and sea was from the southwest, occasionally bearing to [8] the west and to the east of south; the wind at the time of arrival on the scene was force 5 Beaufort. From that time until the tow parted the wind varied from force 5 to force 7 to force 10. The sea during the same time varied between condition 6 and condition 4.

Q. What hours on what date would you say the sea and wind were at their greatest intensity?

A. During the first eight hours of the 16th of November.

Q. And how did the wind and sea conditions compare at the time the towing line parted or for several hours prior thereto with that period you have mentioned as the first eight hours of the 16th of November?

A. Well, the wind increased approximately double in intensity. The condition of the sea increased one point on the Beaufort scale.

Q. Did another craft arrive prior to the parting of the tow line to the Sea Fox? A. Yes.

Respondent's Exhibit G—(Continued)

(Deposition of Lt. Frank C. Schmitz.)

Q. What craft was that?

A. The Tug Neptune.

Q. And when did she arrive on the scene?

A. At 2005, 15 November.

Q. After the parting of the Sea Fox tow line, were there any efforts on the part of any of the vessels present directed towards securing another tow line before daybreak?

A. The Neptune, after its arrival on the scene, endeavored to pass her tow line to the Herald of [9] the Morning. However, the state of the weather prevented her from accomplishing the operation.

Q. What was the situation until daybreak with reference to the Herald of the Morning so far as her being a free agent or being secured?

A. She was completely free of all tow lines and was drifting before the wind and sea in a northerly direction.

Q. After daybreak on the 16th, what, if any, efforts were made with respect to getting a line on the Herald of the Morning and with what result?

A. At daybreak the Neptune——

Mr. Conger (Interposing): This is daybreak of the 16th?

The Witness: The 16th, yes.

The Neptune made another attempt to put her tow line on the Herald of the Morning.

Q. And what was the result of that endeavor or what occurred if you observed it?

Respondent's Exhibit G—(Continued)

(Deposition of Lt. Frank C. Schmitz.)

A. The Tug Neptune, in maneuvering close quarters in the vicinity of the bow of the Herald of the Morning collided on her starboard quarter with the bow of the Herald of the Morning resulting in the Neptune having her starboard fuel tank and tank top punctured by the bow of the Herald of the Morning.

Q. Were you advised of the situation of the Neptune and if so, what thereafter occurred in connection with the [10] Neptune?

A. We were informed of the casualty and shortly after being informed of the casualty our collision mat was requested of us by the Neptune. We then endeavored to pass our collision mat to the Neptune. By 1005 that same day the collision mat had been passed to the Neptune, but, at that time, due to the state of the weather and the condition of the Neptune and its crew, they were unable to use it.

Q. What eventually happened to the Neptune and what participation in the matter did the Balsam take?

A. At approximately 1055 at 16 November, the master of the Neptune informed us that he intended to abandon ship. As this information had been anticipated by the Balsam, rescue operations commenced immediately. The Balsam approached the Neptune; by heaving line passed a messenger to the Neptune; the Neptune crew, then, by heaving in on

Respondent's Exhibit G—(Continued)

(Deposition of Lt. Frank C. Schmitz.)

the messenger, were able to haul a rubber life raft from the Balsam to the Neptune, and, by means of this arrangement the Balsam was able to remove the entire crew of the Tug Neptune.

Q. In the meantime, what was the situation with respect to the Herald of the Morning? Had it changed any or was it the same?

A. The Herald of the Morning, during the foregoing events had continued to drift in a northeasterly direction. [11]

Q. After the Balsam's rescue of the Neptune's crew, will you state whether or not she proceeded to or near the Herald of the Morning?

A. Following our rescue of the crew of the Neptune, the Balsam requested the Tug Sea Fox to stand by the Neptune until it sank. The Balsam then proceeded to the position of the Herald of the Morning.

Q. On arrival in the vicinity of the Herald of the Morning, did you have any communication with her crew then or later in the course of the day?

A. Throughout the day we communicated to them by megaphone.

Q. Did you have any plans for the Herald of the Morning which you conveyed to them or which you intended to execute yourself?

A. In the course of deciding what would be best to do to assist the Herald of the Morning, it was reported to the Balsam by the Herald of the Morn-

Respondent's Exhibit G—(Continued)

(Deposition of Lt. Frank C. Schmitz.)

ing that they had no anchor available. Inasmuch as this was the case the Balsam immediately commenced preparing to take the Herald of the Morning in tow using the Balsam's ten-inch towing hawser.

Q. Will you state whether or not efforts to that end were successful?

A. The line was passed to the Herald of the Morning, secured, and the Balsam proceeded to take the Herald of the Morning in tow, but, due to [12] length of the towing hawser and its size, the hawser parted very shortly after the towing operation commenced and no new efforts were made to renew the towing hawser on the Herald of the Morning.

Q. Later on that day was anything undertaken or done by the Herald of the Morning with respect to her situation and her being a drifting vessel?

A. After our towing hawser parted we again went alongside the Herald of the Morning to determine what means of saving themselves the crew of the Herald of the Morning had available. It was then found that the Herald of the Morning had an anchor available. Following receipt of this information, the Balsam advised the Herald of the Morning that we would track them and let them know when they had reached 30 fathoms of water and at that time they could let their anchor go.

Q. What was the sequel to that advice, and what, if anything, did the Herald of the Morning do?

Respondent's Exhibit G—(Continued)

(Deposition of Lt. Frank C. Schmitz.)

A. At 1915 that same day, November 16th, the Herald of the Morning dropped her port anchor. She was then anchored in 37 fathoms of water to 135 fathoms of port anchor chain.

Q. What was her anchored position?

A. The Herald of the Morning anchored in position 46 degrees, 42.5 north, 124 degrees, 19 minutes west. [13]

Q. Did you observe how she lay to her anchor?

A. She lay heading into the sea and wind.

Q. Was the Sea Fox in the vicinity after the Neptune had sunk and by the time the Herald of the Morning had anchored?

A. The Sea Fox had arrived in our vicinity at 1710 that day after reporting the sinking of the Neptune at 1632.

Q. What was the next craft which arrived in the vicinity of the anchored Herald of the Morning?

A. At 0440 the following day, 17 November, the Coast Guard Cutter Winona arrived from Port Angeles, Washington, to assist as required.

Q. On that morning on the 17th, after the arrival of the Winona, what was the first activity undertaken by any of the attending craft?

A. After arriving in the vicinity of the Herald of the Morning and following the arrival of daylight the Winona anchored in the vicinity of the Herald of the Morning and passed a 12-inch hawser to the Herald of the Morning. Following comple-

Respondent's Exhibit G—(Continued)

(Deposition of Lt. Frank C. Schmitz.)

tion of passing one end of this hawser to the Herald of the Morning she then passed the bitter end of the same tow line to the Tug Sea Fox.

Q. That is, the Winona passed the bitter end of the 12-inch line to the Sea Fox?

A. That is right. This operation was completed by 1145 that day. [14]

Q. When that operation was undertaken and performed by the Winona, what were the conditions of wind and sea?

A. The wind was force 3 from the northwest and the sea was condition 2 from the west.

Q. Will you state whether or not the Herald of the Morning remained at anchor the rest of that day?

A. She did remain at anchor the rest of that day.

Q. And throughout that day she was secured by this line furnished by the Winona to the Sea Fox?

A. That is correct.

Q. We come then to the 18th and was there another craft which arrived on the scene that morning?

A. At 0300 the 18th of November the Tug Hercules arrived on the scene.

Q. What, if anything, did she undertake to do after her arrival?

A. At 0830 the Hercules passed her towing hawser to the Herald of the Morning.

Respondent's Exhibit G—(Continued)

(Deposition of Lt. Frank C. Schmitz.)

Q. Will you describe the weather conditions as to wind and sea at the time that operation was commenced and completed and during it?

A. During that time the wind was southeast, force 4, sea condition 2 and seas coming from the southwest.

Q. As a seaman, how would you generally characterize the general weather condition then as compared to what it had been?

A. Compared to what it had been the sea [15] and wind was very moderate.

Q. How would you characterize the operation of the Hercules in passing her towing hawser to the Herald of the Morning that morning with respect to the difficulties of the operation under the conditions prevailing?

Mr. Conger: I object. I think the witness should describe what actually took place.

The Witness: I am not qualified to testify as an expert witness in what I think would involve expert testimony. It would also require an opinion from me which I am not authorized to give.

Q. How would you compare the weather conditions prevailing at the time the Hercules passed her hawser to the Herald of the Morning with those prevailing when the Winona passed her hawser to the Herald of the Morning on the preceding morning?

A. About the same.

Q. Will you describe what transpired in this

Respondent's Exhibit G—(Continued)

(Deposition of Lt. Frank C. Schmitz.)

situation after the Hercules and the Sea Fox were both secured to the Herald of the Morning?

A. After each of the two tugs had their towing lines secured to the Herald of the Morning the wind caused them to swing around with the wind and in the same direction as the Herald of the Morning was lying, in the same line but opposite direction to the direction the Herald of the Morning was lying. From this position they could not come around to a towing [16] position ahead of the Herald of the Morning due to the fact that the strain on their tow lines prevented effective action of their rudder so they were more or less in irons, unable to move to the right or to the left and due to their position were increasing the strain on the Herald of the Morning's anchor cable.

Q. Did the fact that the Herald of the Morning's anchor was down have any bearing on that situation?

A. Yes. Normally if a vessel is taken in tow, she can be turned and regardless of how the tug lies she will eventually straighten out astern of the towing vessel, but, in the case as the tugs found themselves as described in the foregoing testimony, they were unable to move the Herald of the Morning. As a result, they found themselves in irons.

Q. What was done with reference to the anchor of the Herald of the Morning?

A. After both tow lines had been secured to the

Respondent's Exhibit G—(Continued)

(Deposition of Lt. Frank C. Schmitz.)

Herald of the Morning and due to the fact that the Herald of the Morning had no power with which to raise her anchor, an attempt was made by the Herald of the Morning to slip her anchor. Due to the great strain which was then on the anchor cable it wasn't possible to do this.

Q. What was done to remedy the situation or clear it up?

A. The Balsam, seeing the condition that [17] the tugs and tow were in, offered the Herald of the Morning the use of her portable acetylene cutting outfit. Following the transfer of this outfit to the Herald of the Morning, the Herald of the Morning was able to cut her anchor cable and thus unmoor.

Q. How was the transfer of the burning equipment effected and by whom?

A. The portable cutting equipment was passed to the Herald of the Morning by the Balsam by use of heaving line and messenger.

Q. So when the Herald of the Morning was unmoored she was taken in tow by the Sea Fox and the Hercules and proceeded in tow?

A. That is correct.

Q. And what time was that commenced?

A. The Herald of the Morning slipped her anchor cable at 1009 the 18th of November.

Q. And you have given us the time and date of the 19th when you departed from the tow in the Straits of Juan de Fuca?

A. Yes.

Respondent's Exhibit G—(Continued)

(Deposition of Lt. Frank C. Schmitz.)

Q. From the time of the commencement of the tow until you departed you had proceeded northward with the tow in their company?

A. After the tugs had gotten the *Herald of the Morning* in tow, they proceeded in a northerly direction up the coast and the *Balsam* took station on the *Herald of the Morning's* starboard quarter and maintained this position until the foregoing mentioned position was [18] reached.

Q. Will you please state at what time the *Winona* left the scene?

A. The *Winona* left the scene of the *Herald of the Morning* at 0330, 18 November.

Q. There was a time, was there not, before the unmooring of the *Herald of the Morning* when you left the *Herald of the Morning* to proceed to Astoria with the rescued crew members of the *Neptune* and then returned?

Will you state at what time you left the *Herald of the Morning* and finally returned before her unmooring?

A. We departed the *Herald of the Morning* at 1350, 17 November, proceeded to Astoria to discharge the survivors of the Tug *Neptune*. We arrived back at the scene of the *Herald of the Morning* at 2312 the same day.

Q. What is your present duty, Lieutenant?

A. My present duty is assistant director of the Coast Guard Institute, Groton, Connecticut.

Respondent's Exhibit G—(Continued)

(Deposition of Lt. Frank C. Schmitz.)

Q. Your place of residence is what?

A. 21 Nameaug Avenue, New London, Connecticut.

Mr. Gilligan: Your witness.

Cross-Examination

By Mr. Conger:

Q. At the time you first arrived on the scene when the Sea Fox still had a tow line to the Herald of the Morning, the weather conditions were quite bad at that [19] time, were they not, or did that develop shortly afterwards?

A. Well, it did get worse, if that is what you mean.

Q. As I understand it, when you arrived on November 14th the force of the wind, Beaufort Scale was 5 to 6?

A. That is correct.

Q. And then on the next day, November 15th, it varied somewhat going from force 7 to 3 and then from 10:00 p.m. to 12 midnight it increased to force 8 to 9?

A. That is correct.

Q. As I understand it also continued a strong force wind on the 16th on the early morning and it was force 10 from 1:00 a.m. to 7:00 except for the hours 4:00 a.m. when it was force 9?

A. That is correct.

Q. As I understand it from my notes, the towing cable that the Sea Fox had to the Herald of the Morning parted at 0040, November 16th?

A. That is correct.

Respondent's Exhibit G—(Continued)

(Deposition of Lt. Frank C. Schmitz.)

Q. And that was when it was force 10, is that right? A. That is correct.

Q. When you first got there you were standing by the vessel. Did you expect that the towing line the Sea Fox had would hold as the wind and weather conditions increased?

A. When we first arrived on the scene we endeavored to take the Herald of the Morning in tow. However, due to the very bad sea conditions and the fact [20] that the towing cable from the Herald of the Morning was an additional hazard to any attempt that we could make to accomplish this, we decided that the safest thing to do would be to let things ride and then if the cable parted to take the Herald of the Morning in tow.

Q. Now, at that time you were preparing to take the Herald of the Morning in tow in case the hawser of the Sea Fox couldn't handle it?

A. When we first got there we made a pass at her along her starboard bow and endeavored to pass a messenger to the Herald of the Morning. However, due to the sea conditions and the hazard of the towing cable leading out from the bow of the Herald of the Morning, the attempt was at that time abandoned.

Q. At that time you had no criticism of the Sea Fox for keeping her on to her tow? Was it better for her to hold on to it or let go the hawser, in your opinion, at that time?

Respondent's Exhibit G—(Continued)

(Deposition of Lt. Frank C. Schmitz.)

A. It is not a question for opinion; facts within my knowledge is all I am authorized to testify to.

Q. The hawser finally did part, however, at the height of the weather conditions and the sea and when the force of the wind was at its highest at 0040, November 16th? A. That is correct.

Q. Several days later you attempted to put, and in fact you did put a 10-inch hawser, connected up with the Herald of the Morning and towed it for a short time until [21] it parted.

Was that a manila hawser? A. Yes.

Q. And after it parted you were not equipped then to try any further towing arrangements by yourself, as I understand it? After that hawser parted you were not in a position to take her in tow yourself?

A. The attempt that was made and was unsuccessful to take the Herald of the Morning was made, knowing in advance that your chances for success were very slim, so that when the line parted, as expected, no further attempt was made.

Q. Well, the equipment that the commercial tugs had for towing was probably better than the manila hawsers that you were equipped with, would you say? A. Yes.

Q. In other words, if you had the Sea Fox there in good condition or the Neptune there in good condition, you would prefer that they took over the

Respondent's Exhibit G—(Continued)

(Deposition of Lt. Frank C. Schmitz.)

tow rather than your vessel, the Balsam, if you were in charge of the operation? A. Yes.

Q. When the Neptune was thrown against the bow of the Herald of the Morning, did you see that actually happen? Did you see her when she struck the bow or were you at that moment not watching her?

A. At the time mentioned the Neptune was maneuvering in very close to the bow and frequently was obscured by the bow or portions of the Neptune were frequently obscured by the Herald of [22] the Morning. Due to the position of the Balsam it was impossible to tell whether a collision had occurred or not.

Q. Do you know who the master of the Neptune was?

A. The master of the Tug Neptune was Kelley Sprague.

Q. I understand that after you had gotten the Neptune's crew all aboard your craft, at that time the Herald of the Morning was adrift and you didn't know what might happen to her, so, you sent a message to your station ashore about the situation?

A. After we took all the crew aboard, yes, we did send a dispatch.

Q. And you sent a dispatch to your station ashore? A. To your command.

Q. To Astoria?

Respondent's Exhibit G—(Continued)

(Deposition of Lt. Frank C. Schmitz.)

A. No. The message was directed to the commanding officer of my ship. The commanding officer of the 13th Coast Guard District.

Q. And in that message, as I understand it, you said that there was some danger of the *Herald of the Morning* going ashore and to take steps to do what they could, unless my information is wrong, but, you did send some message, I understand from what you say?

A. From my recollection, as I recall it, we sent a number of dispatches. One of the two that you probably refer to involved reporting the successful completion of the rescue operation of the crew of the *Tug Neptune*. [23]

The other, I believe, concerned the present status of the *Herald of the Morning* and the possibilities of her being lost.

Mr. Conger: That is all. Thank you very much.

Mr. Gilligan: Thank you very much, Lieutenant, that is all.

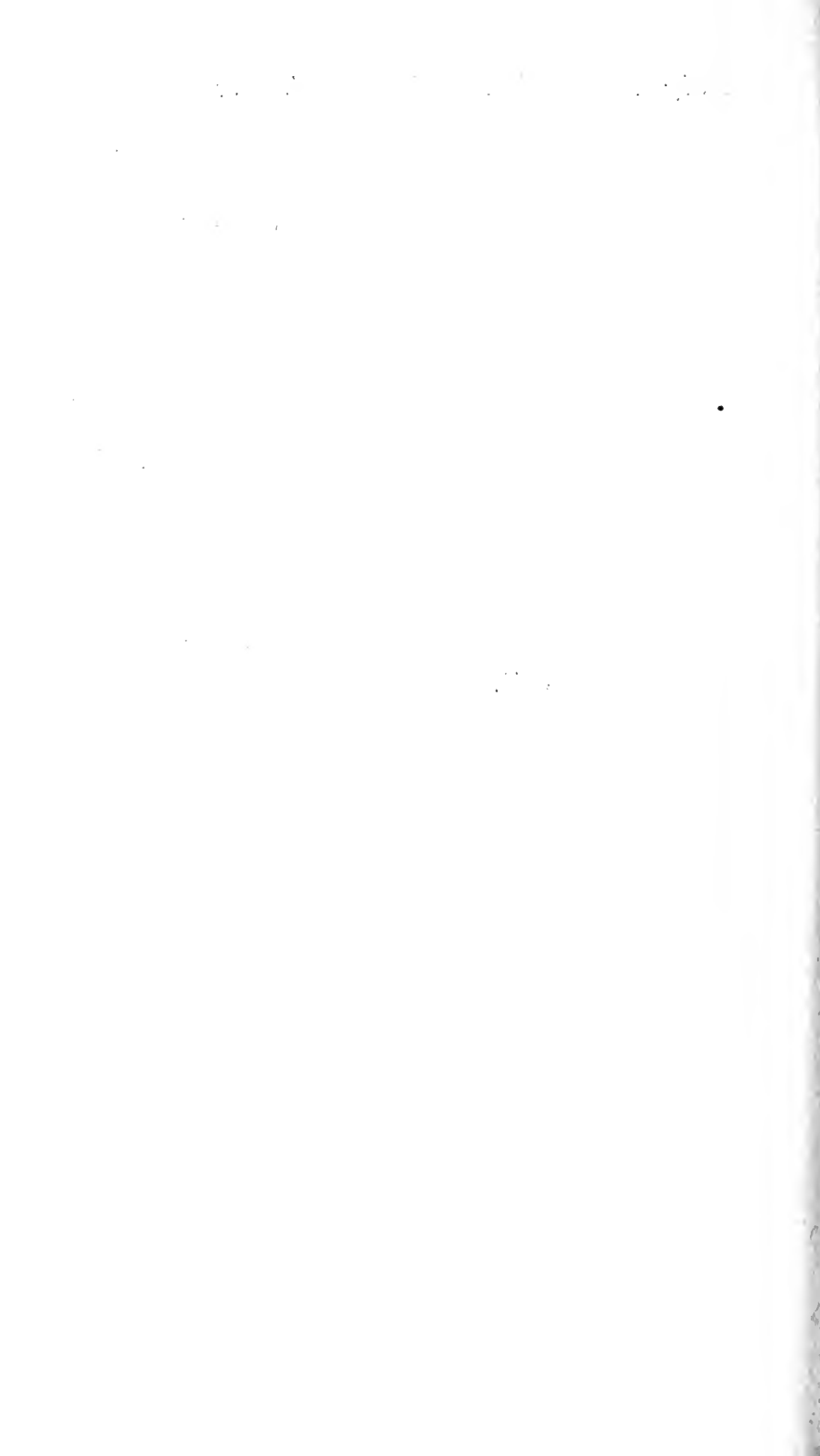
[Endorsed]: Filed January 22, 1951. [24]

[Endorsed]: No. 13135. United States Court of Appeals for the Ninth Circuit. Waterman Steamship Corporation, a Corporation, Appellant, vs. Shipowners & Merchants Towboat Co., Ltd., a Corporation, and Tug Sea Fox, Inc., a Corporation, on their own behalf and on behalf of the Master, Officers and Crew of the Tug Sea Fox, Appellees. Apostles on Appeal. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed October 17, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.



No. 13,135

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WATERMAN STEAMSHIP CORPORATION,
a Corporation,
Appellant,
vs.

SHIPOWNERS & MERCHANTS TOWBOAT
Co., LTD., a Corporation, and Tug
SEA FOX, INC., a Corporation, on
Their Own Behalf and on Behalf
of the Master, Officers and Crew of
the Tug Sea Fox,
Appellees.

APPELLANT'S OPENING BRIEF.

FILED

JAN 29 1952

**PAUL P. O'BRIEN
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No. 13,135

IN THE

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SEA FOX, INC., a Corporation, on
Their Own Behalf and on Behalf
of the Master, Officers and Crew of
the Tug Sea Fox,

Appellees.

APPELLANT'S OPENING BRIEF.

This is an appeal to the United States Court of Appeals for the Ninth Circuit from a final decree of the District Court of the United States for the Northern District of California, Southern Division, in admiralty.

**THE JURISDICTION OF THE DISTRICT COURT AND
OF THIS HONORABLE COURT.**

This proceeding was initiated by the filing of a libel *in personam* for salvage. The libel and the findings of fact disclose that salvage services were rendered on the high seas off the coasts of Oregon and Washington to a vessel owned by appellant Waterman Steamship Corporation¹ by three United States Government vessels, the tug SEA FOX owned by appellee Shipowners & Merchants Towboat Co., Ltd.² and the tugs NEPTUNE and HERCULES.

Jurisdiction in this admiralty matter is vested in the District Court of the United States under the provisions of 28 U.S. Code, Sec. 1333(1).

A final decree was made and filed in the trial Court on June 20, 1951, and entered June 21, 1951 (Apostles on Appeal, pages 70-72). A petition for appeal and order allowing appeal were filed September 17, 1951 (Apostles on Appeal, pages 73, 74) and a notice of appeal was filed September 17, 1951 (Apostles on Appeal, page 75).

Appellate jurisdiction of this Honorable Court exists under 28 U.S. Code, Secs. 1291 and 2107. The notice of appeal was filed within ninety days after the entry of the final decree.

¹Hereinafter called "Waterman".

²Hereinafter called "Shipowners".

STATEMENT OF THE CASE.

Waterman bought the HERALD OF THE MORNING (hereinafter called "Herald"), an Army special type vessel, from the United States Maritime Commission in 1948. The HERALD was then in laid-up fleet in San Francisco Bay and was to be converted at the expense of the Maritime Commission to a cargo vessel by Everett-Pacific Shipbuilding & Drydock Company³ at Everett, Washington, which company was the successful bidder for the conversion job. The conversion contract required Everett-Pacific to tow the HERALD, a "dead ship", at its expense to Everett, Washington, and obligated Waterman to name Everett-Pacific as an assured in Waterman's marine insurance policy on the HERALD. Everett-Pacific was so named in the insurance policy (Libellant's Exhibit 5).

Sudden & Christenson, Inc., as agent for Everett-Pacific in San Francisco, entered into a towage contract with Shipowners whereby the latter agreed to provide the SEA FOX as the towing tug and to "use its best efforts to tow" the HERALD to Everett, Washington, for the agreed sum of \$5,750 plus tax. The said sum of \$5,750 plus tax has been paid by Everett-Pacific to Shipowners. The tow contract purported to release the SEA FOX from liability for negligence and obligated Everett-Pacific to name Shipowners in Everett-Pacific's insurance on the tow (Respondent's Exhibit E; Apostles on Appeal, page 290).

³Hereinafter called Everett-Pacific.

A detailed statement of the events occurring during the tow from San Francisco to Everett, Washington, is attached hereto as Appendix "A". In brief, the SEA FOX with the HERALD in tow departed from San Francisco on November 5, 1948. On November 7, the towing wire broke and another tug was sent out by Shipowners from San Francisco and the vessels eventually returned to Drake's Bay where a new towing wire was transferred to the SEA FOX, although the broken "fairlead traveller"⁴ of the SEA FOX was not repaired, and thereafter the SEA FOX and HERALD resumed the voyage without having an adequate spare "insurance" wire aboard the SEA FOX. On November 13, southeast storm warnings were broadcast by the Weather Bureau and overheard by the SEA FOX. On the following day the weather worsened, and at 7:00 p.m. the SEA FOX advised the HERALD that SEA FOX had called for aid from the Coast Guard and also advised the HERALD that the SEA FOX's towing engine had broken down. The Coast Guard cutter BALSAM arrived on the evening of the 14th and rendered assistance until the HERALD was in safe waters. In addition, the tug NEPTUNE arrived in the vicinity on the late evening of November 15. In the early morning of November 16 the towline parted during severe weather. Shortly after daylight on November 16, the NEPTUNE endeavored to get a towing line aboard

⁴The "fairlead traveller" is a piece of equipment on the towing machine used to guide the cable on to the towing drum and making it possible to take in the cable without fouling.

the HERALD, but during this maneuver was thrown by a heavy wave against the bow of the HERALD and suffered damage as a result of which she sank. Later that day the BALSAM put a 10-in. Manila line to the HERALD but that line parted. The HERALD continued to drift all that day until 7:30 p.m., when on orders from the BALSAM relayed to the HERALD by the SEA FOX, the HERALD dropped her port anchor while some 10 to 12 miles from shore. At 0440 on the 17th the Coast Guard Cutter WINONA arrived at the scene and thereafter rendered assistance. During that morning, a 12" tow line was supplied by the WINONA to the HERALD and the bitter end was transferred from the WINONA to the SEA FOX. Thereafter the SEA FOX pulled on this 12" line to ease the strain on the HERALD's anchor. The HERALD continued to ride at anchor all through the day of November 17 and until the morning of November 18, when the tug HERCULES arrived from Seattle and put its towing wire aboard the HERALD. The HERALD's anchor chain was cut with a cutting torch supplied by the BALSAM, and the HERCULES with the assistance of the SEA FOX and accompanied by the BALSAM proceeded with the HERALD in tow and arrived safely at Everett, Washington, during the late evening of November 19, 1948.

As a result of the foregoing series of events, a libel *in personam* was filed by Shipowners to recover salvage services on behalf of the tug SEA FOX and

its crew, and a companion libel *in personam* for salvage was filed by Puget Sound Tug & Barge Co. on behalf of the tugs NEPTUNE and HERCULES and the crews of said tugs, which latter libel was numbered 25538-H in the files of the Clerk of the United States District Court for the Northern District of California, Southern Division. By stipulation of all parties, the two cases in the lower Court were consolidated for the purpose of trial. Judgments were rendered in favor of libelants in each case. In his memorandum opinion at the conclusion of the trial, the judge held that all salving vessels, government and private, rendered salvage services of an aggregate value of \$60,000 (Apostles on Appeal, page 46); concluded that the valuation of the services rendered by the government Coast Guard vessels was worth \$15,000 and apportioned the remaining \$45,000 as follows: \$24,750 to Shipowners and crew of the SEA FOX, and \$20,250 to Puget Sound Tug & Barge Co. and crews of the NEPTUNE and HERCULES. The judgment in favor of Puget Sound was paid and has been satisfied of record. Being gravely aggrieved by the judgment in favor of Shipowners, Waterman has taken this appeal.

ISSUES INVOLVED.

The questions presented by this appeal are:

1. The validity of the towage agreement purporting to release the tug SEA FOX from liability to the HERALD for acts of negligence of the SEA FOX.

2. Whether the SEA FOX was negligent during the tow in respect to her equipment or navigation.

3. Whether the SEA FOX is entitled to any salvage award or whether the services performed by the SEA FOX were performed merely in satisfaction of its obligation to its tow (the HERALD).

4. Whether SEA FOX carried its burden of proving that its failure to have a duly-licensed master in command of the SEA FOX not only did not but could not have contributed to the circumstances giving rise to the salvage services.

5. Whether the trial Court should have made a proper deduction from its salvage award in favor of SEA FOX by reason of the existence of the contractual relationship of tug and tow, and whether the Court allocated a sufficiently large proportion of the overall award to the services of the government vessels.

6. Whether Waterman can claim over against SEA FOX for HERALD's damages and for the amount of salvage paid to the NEPTUNE's and HERCULES' interests.

SPECIFICATIONS OF ERROR.

First. The District Court erred in failing to hold and find that the clause in the towage contract (Respondent's Exhibit "E"; Apostles on Appeal, page 290) which provided:

“4. * * * First Party shall not be responsible for loss or damage arising from faults or errors in the navigation or management of tug or tow.”

was illegal and void. Assignment of Errors numbered 13 and 14 (Apostles on Appeal, page 78).

Second. The District Court erred in failing to hold and find that appellee failed to carry its burden of proving that the absence of a duly-licensed master in command of the SEA FOX not only did not but could not have contributed to the circumstances giving rise to salvage services. Assignment of Errors, numbered 5, 6, 10, 11, 19, 20 and 21 (Apostles on Appeal, pages 76-79).

Third. The District Court erred in holding and finding that the SEA FOX interests are entitled to an award in the amount of \$24,750. Assignment of Errors, numbered 1, 4, 7, 8, 9, 12, 16, 17, 18, 19, 20 and 21 (Apostles on Appeal, pages 76-79).

Fourth. The District Court erred in dismissing the cross-libel. Assignment of Errors numbered 2, 3, 13, 14 and 15 (Apostles on Appeal, pages 76-78).

ARGUMENT.

FIRST SPECIFICATION OF ERROR.

The District Court erred in failing to hold and find that the clause in the towage contract (Respondent's Exhibit "E"), Apostles on Appeal, page 290, which provided:

“4. * * * First party shall not be responsible for loss or damage arising from faults or errors in the navigation or management of tug and tow.”

was illegal and void. Assignment of Errors numbered 13 and 14 (Apostles on Appeal, page 78).

The towage contract is one maritime in nature. Under such circumstances, the decisions of the Federal Court sitting in admiralty are conclusive of the matters involved.

Union Fish Co. v. Ericson, 248 U.S. 308, 63 Law. Ed. 261.

The provision of the towage contract purporting to free SEA FOX from liability for its own negligence is void.

Compania de Navigacion, etc. v. Fireman's Fund, 277 U.S. 66, 72 Law. ed. 787;

Mylroie v. British Columbia Mills Tug & Barge Co. (C.C.A. 9, 1920), 268 Fed. 449.

SECOND SPECIFICATION OF ERROR.

The District Court erred in failing to hold and find that appellee failed to carry his burden of proving that the absence of a duly-licensed master in command of the SEA FOX not only did not but could not have contributed to the circumstances giving rise to salvage services. Assignment of Errors, numbered 5, 6, 10, 11, 19, 20 and 21 (Apostles on Appeal, pages 76-79).

This phase of the appeal deals with the question whether the rule of *The Pennsylvania* case, *The Pennsylvania* (1874), 86 U.S. 125, 22 Law. ed. 148, applies in a salvage situation. In that case the Supreme Court of the United States held in part:

“But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute.”

Shipowners was at fault in not providing a qualified and competent master for the SEA FOX. R. T. Sommers, the “master” of the SEA FOX, had no license or certificate permitting him to serve as a master, skipper or navigating officer in charge of a watch except on inland waters in San Francisco Bay and tributaries. On this voyage Sommers in fact sailed as, and assumed the authority of, master, and in addition personally stood the 8-to-12 watch as navigating officer (Apostles on Appeal, page 298). This was a statutory fault both as to Shipowners and as to Sommers.

The International Convention covering the Minimum Requirement of Professional Capacity for Masters and Officers (effective in the United States Oc-

tober 29, 1939, text at 1938 A.M.C. 1284, administrative and penalty provisions, 46 U.S.C.A. 224a) applied to the SEA FOX, a vessel of more than 200 gross tons engaged in a voyage on the high seas. Not only does such fault subject both Shipowners and Sommers to fine (46 U.S.C.A. 222(a)(5)) but it was inexcusable and criminal misconduct for Shipowners to have entrusted not only the lives of the crew of the SEA FOX but also the sixteen lives aboard the HERALD and the HERALD itself to the orders and judgment of a man who by law in the interest of protecting life and property was prohibited from undertaking such responsibility. This fault bars not only Sommers and Shipowners, but also the crew of the SEA FOX, from any claim for salvage.

The fault being in direct violation of statute, the burden was on the salvage claimants to prove that the incompetence of the master of the SEA FOX not only did not but that it could not have contributed to the danger from which the HERALD was extricated.

See:

The Pennsylvania (1874), 86 U.S. 125, 22 L. ed. 148;

The Denali (C.C.A. 9), 112 F. (2d) 952,

wherein this Court in a stranding case applied the rule of *The Pennsylvania* case to deny limitation of liability to the owner of a vessel as against cargo claimants where the vessel's officers failed to comply with the Watches at Sea Act, 46 U.S.C.A. 223.

The rule and presumption of *The Pennsylvania* case have been applied to fix liability where a master of a tug did not have the required license. In *The City of Baltimore* (C.C.A. 4), 282 Fed. 490, the Court said:

“She was being navigated by a person without a master’s license, in a busy harbor, and in open violation of the law applicable to her * * * and, in such circumstances, it is incumbent upon her to show, not only that the absence of a licensed master did not enter into the occurrence, but that it could not have done so.”

The tug operator is held to the highest standard of care in the selection of his master, and the haphazard nonchalance of Shipowners in this case is not to be condoned. In *The Lady Pike*, 21 Wall. 1, 22 L. ed. 499, the Supreme Court, in holding a towing steamer liable for loss of cargo aboard a towed barge, said:

“Necessary equipment is as requisite as that the hull of the vessel should be staunch and strong; and she must also be provided with a crew adequate in number and competent for their duty with reference to all the exigencies of the intended route, and with a competent and skillful master, of sound judgment and discretion, and with sufficient knowledge of the route and experience in navigation to be able to perform in a proper manner all the ordinary duties required of him as master of the vessel.”

The evidence shows that the absence of a qualified master aboard the SEA FOX contributed to the situ-

ation of danger in which the HERALD was placed. The record is devoid of evidence that Sommers was in fact qualified or competent either as a navigator or as a seaman in respect to the duties and responsibilities required of a tug master on the voyage undertaken.

The sole testimony or evidence introduced by libelant to "prove" the competence and experience of R. T. Sommers was that he had made a number of previous trips up the coast (Apostles p. 246), also in violation of statute. Mr. Sommers was unable to remember when he had made these prior trips and pursuant to stipulation (Apostles pp. 301-302) the record of trips which he had made in 1947 and 1948 was produced and considered by the District Court as an exhibit. This exhibit is reproduced as Appendix C hereto, apparently having been omitted from the Apostles through inadvertence despite the stipulation including this item in the record which stipulation was filed with this court on October 30, 1951. From Appendix C it appears that the only prior experience Mr. Sommers had had in towing vessels off shore was in August 1948. Such experience is wholly meaningless. The libelant's obligation to the HERALD was not satisfied by furnishing a tug with an unlicensed, unqualified, fair weather skipper; respondent and the 16 men aboard the HERALD were entitled to assume Shipowners would furnish a qualified tug skipper who would know what to do in November weather in the north Pacific. The Pacific Coast Pilot (Sixth Ed.), a United States Govern-

ment publication, p. 37, summarizes its description of the weather to be expected in the North Pacific in August with the words "August is usually a quiet month" while the November summary is "November is a stormy month". Fair weather experience does not qualify a skipper for service in the North Pacific in November.

By the testimony of the SEA FOX it appears that its insurance wire was lost by fouling on its own drum on November 7 before putting into Drake's Bay. This was a standard and usual operation and if conducted competently should not have resulted in loss of the wire.

Having lost the insurance wire, it was negligence on the part of the SEA FOX to proceed on its voyage from Drake's Bay without having on board an extra wire of proper length.

In *The Barryton* (D.C. S.D. N.Y.), 42 F. (2d) 561, Judge Coleman said:

"The tug could certainly have rendered assistance if it had not been encumbered with the Foggy Dew and had an additional hawser. The lack of the latter was no excuse, because I believe it was negligence to be without it."

The difficulty the SEA FOX had experienced in handling the HERALD before reaching Drake's Bay, whether due to the incompetence of the crew of the SEA FOX or the inadequacy of its equipment, only aggravated its negligence in leaving Drake's Bay without taking precautions to insure that the SEA

FOX was adequately equipped to continue the voyage in a proper manner. There is not one bit of evidence that at Drake's Bay the towing machine of the SEA FOX, which, according to the SEA FOX testimony had been subjected to extraordinary strain, was inspected for indications of the defects which later caused its failure. Neither is there one bit of evidence that the "fairlead traveller" which the SEA FOX log states was damaged and removed on November 8th (Finding IV, Apostles p. 58) and without which it was impossible for the SEA FOX to handle the tow wire without fouling, was repaired or replaced before leaving Drake's Bay. The testimony of the SEA FOX is that the gears of its towing engine were damaged—and that the tow lines subsequently parted in direct consequence of the extraordinary stress of weather. In connection with the claim it should be noted that the log of the SEA FOX is replete with erasures and changes. For example, the entry for the 8:00 to 12:00 P.M. watch November 13, which apparently originally read, "Towing out of commission", has been changed to read, "Towing engine broke". This is particularly interesting since in the testimony given by the SEA FOX witnesses there was no mention of any difficulty with or breakdown of the towing gear of the SEA FOX until the 14th, at which time it was testified the clutch gears of the towing machine gave way. The log indicates that the towing engine gears carried away at 7:00 A.M. on the 14th. It is interesting to conjecture what portion of the towing engine of the

SEA FOX was out of commission on the 13th and what relation this failure had to the carrying away of the gears at 7:00 A.M. on the 14th. The conjecture is particularly interesting since there was no severe weather on the 13th.

As mentioned above, it appears from the SEA FOX log that the SEA FOX towing engine broke during the 8:00-12:00 P.M. watch on the 13th when there was no severe weather. It also appears from the SEA FOX log (Respondent's Exhibit A, not printed) that the SEA FOX did not even attempt to secure Coast Guard assistance until 4:20 P.M. the following day, some 17 hours later, even though on the 13th the SEA FOX had received radio warnings of approaching heavy weather. Such casual disregard of the HERALD's safety resulted directly from the criminal negligence of the libelants in entrusting the HERALD and her 16 lives to R. T. Sommers, a man having no experience on the high seas in the stormy season, having no qualifications for an off-shore command and having no knowledge of even the most elementary steps to take in a emergency occurring off-shore. We do not question Mr. Sommers' blind courage, but the HERALD was entitled to more.

The District Court accepted the finding proposed by the SEA FOX interests that the towing hawser parted as a direct result of the violence of the storm and was an event not contributed to by the SEA FOX or libelants. This finding not only is not supported by the evidence but is contrary to the evidence. The

libelants' testimony (Apostles p. 124) is that the towing hawser "Parted right on the fairleads. The wire finally smashed itself right there until it parted". It appears from the record, and in fact is not contested, that the proximate cause of the parting of the towing hawser was the defective condition of the towing engine which prevented the SEA FOX from either letting out or heaving in the hawser resulting in the same portion of the hawser wearing and chafing continuously on the fairleads until inevitably it broke. We recall that prior to putting into Drake's Bay on November 8th the towing engine was apparently stronger than the towing hawser since it was the hawser which broke, even though in that episode the towing engine suffered substantial damage including effective destruction of the fairlead traveller which was never repaired and without which it was impossible to heave in the towing hawser while under way. On the other hand it appears that on November 14th the towing hawser was stronger than the towing engine since on that date the clutch gears of the towing engine stripped. We do not know what portion of the towing engine broke on November 13th during relatively calm weather. In any event it does not appear that the towing engine was properly inspected or repaired in any way before leaving Drake's Bay. Since it appears from the libelant's own log and testimony that on leaving Drake's Bay the SEA FOX had only one-half of an effective towing engine (it could let out but could not heave in because of the absence of the fairlead traveller) the SEA FOX

interests had the burden of proving that such negligence and unseaworthiness did not contribute to the ultimate parting of the towing hawser. The record shows quite the contrary. The record is completely absent any testimony or evidence that a properly qualified skipper of the SEA FOX (if she had had one) would not have insisted that the towing equipment of the SEA FOX be inspected and in seaworthy condition before leaving Drake's Bay.

The failure of Shipowners in this regard is wholly inexcusable since at Drake's Bay the tug SEA PRINCE was in attendance and under the towage agreement (Apostles p. 290) Shipowners had the option of using the tug SEA PRINCE.

The failure of the SEA FOX to seek Coast Guard assistance or a port of refuge before 4:20 P.M. on the 14th when it was too late is incredible in view of the SEA FOX log notation that its towing engine broke before midnight on the 13th and in view of the weather information that was available to it on the 12th and 13th. We quote the following excerpts from Respondent's Exhibit J (not printed) which are the scripts of the weather broadcasts to mariners during the period in question:

'0830 PST November 12, 1948

Tatoosh to Cape Blanco variable winds 5 to 15 mph becoming westerly 10-20 mph late today or tonight. Mostly cloudy with light rain Washington coast by this afternoon and likelihood of light rain north Oregon coast tonight.

‘0800 PST November 13, 1948, summary north-east Pacific.

A storm of considerable intensity is near 53 N 144W with pressure about 985 mbs moving north-east towards the coast north of Vancouver Island but will affect the coast as far south as Oregon by tonight. Southerly wind force 6 to 9 within 300 miles of the center on the east side becoming westerly as the storm passes. Another disturbance moving eastward centers north of the Aleutian islands but low pressure and fresh south-westerly winds extend south to latitude 45 from the Aleutians and Alaska Peninsula.

‘0830 PST November 13, 1948 Tatoosh to Cape Blanco.

Off Washington coast wind becoming south-southeast 25-35 mph this evening increasing during the night and shifting to northwest Sunday. Off Oregon coast wind northwest 15-25 mph passing to south or southeast and increasing to 25-35 mph tonight.

A storm of considerable intensity lies 500 miles off the coast of British Columbia moving toward the coast north of Vancouver Island. It will affect the coast from Oregon northward tonight but will not extend its effect as far down as California.

‘2000 PST November 13, 1948.

An intense disturbance has moved east north-eastward at 32 knots or approximately 350 miles southwest of Juneau Alaska with lowest pressure near 980 mbs. The center is expected to move

northeastward at about 20 knots with gale force wind within 500 miles of the center. The associated strong front is located at about 200 miles off the Washington coast and extends to the north-northwestward and to the south-southwestward with gale force wind from about 45 north latitude northward. It is expected to move southeastward at approximately 30 knots.

Coastal storm warnings. Southeast storm warnings are displayed until 1500 PST Sunday on the Washington Coast and mouth of the Columbia River for southeasterly wind 35 to 45 mph. Small craft warnings are displayed for the same period south of Astoria to Cape Blanco and over the inland waters of Washington for southeasterly wind of 25 to 35 mph. Winds will shift to westerly early Sunday.

The duty of a tug to take its tow to refuge upon receiving indications of stormy weather is stated as negligence for which the tug is liable in *The Benjamin H. Wharford*, 290 Fed. 816; *The Victoria*, 79 Fed. 122, and *The Edgar H. Vance*, 284 Fed. 56 (cert. den. 260 U.S. 750).

The negligence of the SEA FOX in failing to seek refuge on the 12th, 13th and 14th is particularly inexcusable in view of its recent experience of the 6th, 7th and 11th. The SEA FOX log (Respondents' Exhibit A) for November 6th indicates that in a wind of force 5 (19 m.p.h.)⁶ the SEA FOX was unable to

⁶Beaufort Scale is set forth in Appendix "B".

control the HERALD and was making "sternway". The SEA FOX witnesses have furnished no satisfactory explanation of their failure. It must be assumed that the failure was due to sheer recklessness and disregard of the weather, to lack of knowledge of position or to lack of necessary charts, all of which are in themselves negligence.

It is clear from an examination of the SEA FOX log for the 6th, 7th and 11th that in the early stages of the voyage the SEA FOX crew had had ample opportunity to learn that the SEA FOX was unable to handle or control its tow in a wind of force 5 on the Beaufort Scale (17 to 21 miles per hour). On the 7th, for example, with a wind of force 5 the SEA FOX went backwards for 31 miles and the tow line parted.

Shipowners also had knowledge of the proviso in the U. S. Salvage Association survey (Libellant's Exhibit 7; Apostles on Appeal, page 285) cautioning the tug to take advantage as much as possible of favorable weather.

In view of this background of experience and of expert caution, it is incredible that upon receiving the weather information on November 13 clearly indicating the imminency of storm weather that the SEA FOX did nothing but keep on its course.

On this phase of the matter we conclude that Shipowners has failed to carry its burden of proof under the rule of *The Pennsylvania* case that the absence of a properly licensed and qualified master not only

did not but could not have contributed to the HERALD's troubles in that there is *no* evidence controverting the proof of Sommers' incompetency and negligence in the following particulars:

(a) Sommers had no experience in towing large vessels at sea at that season of the year.

(b) Sommers was incompetent in that he permitted the tow line to break on November 7 in relatively mild weather.

(c) Sommers was incompetent in that he permitted the new wire given to the HERALD on November 7 to become fouled on the SEA FOX towing engine.

(d) Sommers was incompetent in that he departed from Drake's Bay without checking the towing engine, without repairing the fairlead traveller and without having a satisfactory insurance wire aboard.

(e) Sommers was incompetent in that he failed to head for sea and immediately call for aid when storm warnings were heard. In fact, Sommers waited nearly 24 hours before taking any action. Each and all of such faults contributed to the circumstances wherein salvage services were required.

THIRD SPECIFICATION OF ERROR.

The District Court erred in holding and finding that the SEA FOX interests are entitled to an award in the amount of \$24,750. Assignment of Errors,

numbered 1, 4, 7, 8, 9, 12, 16, 17, 18, 19, 20 and 21 (Apostles on Appeal, pages 76-79).

Under this heading we discuss two fundamental errors of the trial Court and two additional errors which were sequential to the fundamental errors. The fundamental errors were the trial Court's failure to hold the SEA FOX barred from claiming salvage by reason of (1) its fault and negligence and (2) its contractual obligation to the tow. The sequential errors are found in the District Court's failure, after erroneously holding that the SEA FOX was entitled to claim any salvage, to reduce the award otherwise attributable to the SEA FOX services by reason of the tug and tow relation and its failure to attribute a proper proportion of the total salvage services to the Government vessels. The sequential errors we treat under the subheading, "Excessive Award to Sea Fox."

Negligence of SEA FOX.

The specifications of negligence and fault attributable to the SEA FOX interests are fully discussed under our First and Second Specifications of Error, and at this point we respectfully request that the prior discussion again be fully considered.

All authorities are agreed that a tug cannot recover salvage when its own fault has contributed to the peril from which the tow is saved.

The Minnehaha, Lush 335, 15 Eng. Reports,
Full Reprint 444;

The Marechal Suchet, XI Asp., N.S. 553;

The Krona, 28 Fed. 318.

The Contract as a Bar to Salvage.

Under the towage agreement (Apostles on Appeal, page 290) Shipowners agreed to "furnish the tug SEA PRINCE or SEA FOX and use its best efforts to tow the SS HERALD OF THE MORNING from San Francisco Bay to Everett, Washington."

The general rule is that there can be no salvage claim where there is a contractual or relational duty to assist. The rule is stated in *Robinson on Admiralty*, page 709: "Salvage can be had only if the property saved is in peril and has been rescued from the peril by those who were under no legal duty to act."

It is undisputed that it is in only the most unusual circumstances that a tug may claim salvage from her own tow. The question is whether the SEA FOX interests have proved that such extraordinary circumstances existed.

The SEA FOX interests can claim salvage only if the contract of towage was frustrated by unforeseeable supervening circumstances relieving them of any obligation to use their "best efforts" to tow the HERALD. Even *force majeure* does not release a promisor from his contractual obligations unless the *force majeure* which renders performance more difficult was unforeseeable. *Intercoast S. S. Co. v. Seaboard Transpt. Co.*, C.C.A. 1, 291 Fed. 13.

No circumstances or conditions were encountered by the SEA FOX which were not foreseeable or not to be anticipated during the course of a voyage in

November off the northern Pacific Coast. The witnesses without exception testified that November was “not a good month” or was a “stormy month”.

We also quote, as we did for the District Court, an excerpt from The United States Coast Pilot, Pacific Coast (Sixth Ed.), a United States Government publication, from its section on Pacific Coast weather by months (pp. 36-37):

“October marks the beginning of stormy weather. Occasional disturbances with high southeasterly gales may be expected from the Strait of Juan de Fuca south to Point Reyes. Rainfall is heavier and fog is less frequent except south of Cape Mendocino.

November is a stormy month. Southeasterly gales are frequent, increasing in severity toward the close of the month. This month marks the beginning of the rainy season in California.

December is a stormy month. Southeasterly gales are frequent and winds from 40 to 60 miles an hour may occur with these storms. The rainfall is heavy along the entire coast. Low-lying fogs frequently occur in the morning along the coast, but are much less frequent than in summer.”

We do not doubt that life aboard a tug at the time in question was thoroughly unpleasant. That, however, is a hazard normally incident to the life of a seafaring man aboard seagoing tugs at that season in that area. There is nothing in the record to indicate that the weather was other than that which might normally have been foreseeable at that season and even the salty expressions of the seafaring libel-

ant participants do not lead to a contrary conclusion. We do not contend that the weather conditions encountered by the SEA FOX offshore may not have been somewhat more severe than those reported by the Government coastal stations, but it is nonetheless interesting to refer to Respondent's Exhibit J (not printed). The highest reported wind velocity for the entire coast for the period from November 14th through November 19th was 44 (statute) miles per hour reported by Tatoosh 2000 November 14th. The next highest reported velocity was 35 (statute) miles per hour reported by Point Arguello 2030 November 14th and the only other velocity reported in excess of 30 miles per hour was the wind of 32 miles per hour reported by Tatoosh 0800 on the 16th.

The weather was unpleasant but not unforeseeable.

That the SEA FOX did nothing that it was not required under its contract to do is perhaps best stated by considering briefly the legal situation that would have arisen if the SEA FOX had broken its contract and failed to "use its best efforts", i.e., if it had completely abandoned the HERALD and the HERALD had been lost.

In the *Barryton*, 42 F. (2d) 561, the tug Barryton was held liable for the loss of three barges during a storm and was held at fault because "(3) it left the barges and failed to take adequate steps to assist them after the hawser broke."

In the *Seminole*, C.C.A. 4, 279 Fed. 94, the tug was held guilty of "inexcusable negligence" and lia-

ble for loss of the tow where the tug failed to stand by the tow and do everything possible to save it after being forced to cast the tow adrift in a gale.

In *In re Moran* (D.C.), 120 Fed. 556, 564, the Court said:

“To excuse a tug for leaving and remaining away from her tow, there should be proof that the tow was sinking, or past saving, or that the tug was so injured or in such danger that it could not stay or return, or similar condition.”

In *Appeal of Cahill*, 124 Fed. 63, 64 (C.C.A. 2), the Court said:

“Even if the circumstances had been sufficient to justify the master of the tug in cutting loose from the dredge in order to take off the men, they did not justify him in deserting her and her scows and allowing them to be beached without any effort to save them. We are satisfied there was a reasonable chance that they could have been saved if the tug had resumed charge of them. Their owner was entitled to the benefit of the chance, and as he has been deprived of it by the conduct of the tug, in disregard of her duty to use all reasonable efforts for the preservation of her tow, the tug must respond for the consequences, in the absence of clear proof that her efforts would have been ineffectual.”

In *Alaska Commercial Co. v. Williams* (C.C.A. 9), 128 Fed. 362, 368, this Court said, in considering the length of time the tug's duty to stand by the tow endures:

“It certainly existed during that day and so long thereafter as the schooner continued to drift toward the shore or to proceed on her course to Yakutat, and so long as the Bertha could have returned and rescued her.”

In *Atkinson v. Scully* (D.C.), 246 Fed. 463, the Court said:

“It must be remembered that the courts have held tugs to a high degree of diligence in endeavoring to save a tow which has gone adrift. Usually the tow is helpless, and to abandon it is to commit it to almost certain loss or injury, where a gale is on and the sea is rough.”

If the SEA FOX had done any less than it did and as a result the HERALD had been totally lost, there is no question that Waterman would be entitled to recover from Shipowners. Since the alleged services of the SEA FOX were only in pursuance of its contract and no circumstances or conditions were encountered which were beyond the reasonable contemplation of Shipowners in entering into the towage contract, Shipowners is barred from claiming salvage.

For the same reason the master, officers and crew of the SEA FOX are likewise barred from claiming salvage.

In the *Marechal Suchet* (XI Aspinall's Reports of Maritime Cases, N.S. (1911), p. 553), the tow had been driven aground during a gale in the English Channel in February and the tug had assisted in the refloating of the vessel and claimed salvage. After

commenting that the weather conditions were no more severe than might reasonably have been expected, the Court said:

“In my view what she did she ought to have done as the tug under the towage contract.

* * * In my opinion the master and crew of the *Guiana* are not entitled, as they performed no more than their duties in the towage service

* * *”

We have searched diligently both the American and English cases and have been unable to find any case where the tug has been relieved of its contract and entitled to claim salvage of its tow by reason of encountering severe weather conditions. All of the cases in which the tug has been granted salvage are cases in which the tow was placed in danger by a failure of the *tow's* own equipment or in which the tug's watertight integrity had been breached through no fault of her own. The cases in which the tug has been granted salvage against its tow are:

The Minnehaha, Lush 335, 15 Eng. Rep., Full Reprint 444 (failure of hawser furnished by tow);

The I. C. Potter, L.R., 3 A. & E. 272 (tug's bunkers flooded in full hurricane and suffered damage requiring £144 and two weeks to repair);

The Joseph F. Clinton, 250 Fed. 977 (break-down of tow's pump);

The City of Haverhill, 66 Fed. 159 (tow sprang seams and leaking badly);

The City of Portland, 298 Fed. 27 (tow lost propeller shaft and took water);

The Connemara, 108 U.S. 352, 27 L. Ed. 751 (fire on tow);

Kovell v. Portland Tug and Barge Co. (C.A. 9), 171 Fed. (2d) 749 (damage to tug and tow sufficient to terminate voyage; claim not asserted by tug and did not involve services by or aboard tug).

The rule is properly stated in the *I. C. Potter*, L.R., 3 A. & E. 272:

“I think the true criterion by which it is to be ascertained whether the towing vessel has become a salvor is whether the supervening circumstances were such as to justify her in abandoning her contract.

“* * * On the other hand, the law is clear that a contract once entered into cannot be broken merely because a change of weather or other supervening circumstances have rendered the execution of it more onerous than was anticipated. In my judgment there must be among the supervening circumstances an element of serious danger, not in contemplation of the parties to the contract, in order to justify the abandonment of the contract and to found a salvage service.”

In the *City of Khios* (D.C. S.D. N.Y.), 16 Fed. Supp. 923, it was held that a whole gale with squalls of hurricane force did not constitute a “peril of the sea” since “it was reasonably to be expected that in the North Atlantic, at that particular time of the year, severe weather would be encountered”.

In the *Naples Maru*, 1939 A.M.C. 1090, Judge Learned Hand in holding a vessel not responsible for cargo damage under its bills of lading in considering a storm in the North Pacific in November and December with wind velocities of 9 and 10 on the Beaufort scale said, "It was no more than was to be expected in those waters at that time".

In the *Schickshinny*, 1942 A.M.C. 910, where the vessel encountered winds of Beaufort force 11 and 12 on the North Atlantic in March, the Court said: "Unquestionably, rough weather and heavy seas were encountered, but where a vessel is subjected to no greater risk or damage than reasonably might have been anticipated on the voyage, peril of the sea furnishes no immunity".

It is clear that the SEA FOX encountered no conditions that were not foreseeable for the North Pacific in November and within the reasonable contemplation of Shipowners at the time of entering into the towage contract. The SEA FOX was, therefore, at no time free of her contractual obligation to use her "best efforts".

The Poznan, 276 Fed. 418;

Rotterdamsche Lloyd v. Goshko, 298 Fed. 443;

Balfour Guthrie v. Portland etc. S. S. Co., 167

F. 1010.

All services rendered by the SEA FOX were in pursuance of her contract and the libelants are barred from recovering salvage.

EXCESSIVE AWARD TO SEA FOX.

We do not contest the aggregate valuation which the District Court placed on all services rendered to the HERALD of \$60,000 (Apostles p. 46), although we do consider it on the high side. In first determining the aggregate value of all services and then allocating among the participants, whether or not the participants are in a position to claim salvage, the District Court followed established law. *Robinson on Admiralty*, p. 748; *The Anahuac*, 295 Fed. 346, aff'd 3 F. (2d) 250. We do not contest the trial Court's apportionment of the *services* performed as between the SEA FOX interests and the Puget Sound interests. We contended at all times that SEA FOX services substantially exceeded the services of NEPTUNE and HERCULES, and we contended throughout that the HERCULES, NEPTUNE and SEA FOX interests combined furnished less than 50% of the aggregate services including those furnished by the Government vessels.

We strenuously contest the apportionment of only \$15,000 of the overall award to the Government vessels and we strenuously contest the apportionment of the full \$24,750 to the SEA FOX interests as if the SEA FOX were a meritorious volunteer salvor.

(a) SEA FOX Contract as Partial Bar.

The District Court having erroneously failed to bar the SEA FOX from salvage by reason of its negligence and contractual obligation, it was further error for the District Court in its decree to award the

SEA FOX the full portion of the aggregate award attributable to its services without *any* reduction on account of the tug's obligation to her tow. Under no conceivable theory was the SEA FOX entitled to claim as a volunteer salvor and its was obvious error for the District Court to treat her as such.

City of Portland (C.C.A. 5, 1924), 298 Fed. 27.

“* * * We are of the opinion, therefore, that the Ella Andrews and the Wilmot were rendering salvage service from the time the propeller shaft dropped out of the City of Portland, but that they should not receive as great an award as would be allowed to an independent tug.”

(b) Government Vessels.

In this phase of our discussion we disregard those factors of fault and contract which we respectfully submit bar the SEA FOX from salvage. For purposes of this discussion we accept the trial Court's valuation of the overall services at \$60,000 and our sole endeavor is to review the services performed by all vessels so that this Court may determine whether we are correct in our contention that the services rendered by the government vessels were at least 50% (or \$30,000) of the overall rather than 25% (or \$15,000) of the overall as found and held by the trial Court. It is our respectful contention that a review of the record will satisfy this Court that the trial Court should have allocated more than \$30,000 of the aggregate award to the government services and less than \$30,000 to the combined SEA FOX, HERCULES

and NEPTUNE services. We have not appealed from the Puget Sound decree and we of course do not contend on the phase of the case that we are discussing here that the full \$15,000 deficiency in the government allocation should be deducted from the SEA FOX award but we do claim that in any event its award should be reduced proportionately.

The Blackwell, 10 Wall. 1, 19 L. Ed. 870 is usually cited for the factors to be considered in valuing salvage services:

“* * * Courts of admiralty usually consider the following circumstances as the main ingredients in determining the amount of the reward to be decreed for a salvage service.

1. The labor expended by the salvors in rendering the salvage service.
2. The promptitude, skill, and energy displayed in rendering the service and saving the property.
3. The value of the property employed by the salvors rendering the service, and the danger to which such property was exposed.
4. The risk incurred by the salvors in securing the property from the impending peril.
5. The value of the property saved.
6. The degree of danger from which the property was rescued.

The purpose of this discussion is entirely comparative and as items 5 and 6 are identical for all salvors, these items require no discussion.

Salvors' values:

Sea Fox	\$ 125,000	Winona	\$ 750,000
Hercules	125,000	Balsam	400,000
Neptune	150,000	*Prairie	950,000
<hr/>		<hr/>	
\$ 400,000		\$2,100,000	

*The USS PRAIRIE was a specialized ship of a size at least as large as the HERALD. Being a government vessel, it has no 'market value'. Its replacement value was undoubtedly in excess of the value of the HERALD when converted to a cargo vessel, to-wit, \$957,818.

It is to be borne in mind that salvage services are claimed only for the time *subsequent* to the breaking of the tow line at 0040 November 16 and that during the entire salvage period the SEA FOX engine was broken and she had aboard only a short length of cable which was never broken out for use and which for practical purposes was probably unusable (Apostles p. 392). On the other hand the cutter WINONA carried a complement of 106 officers and crew, was 254 feet in length, had 4000 horsepower, a speed of 18 knots and was equipped with emergency towing gear. The BALSAM carried a complement of 44 officers and crew, was 180 feet in length, had 1000 horsepower, a speed of 13 knots and was equipped with emergency towing gear. The Coast Guard vessels were well equipped, well manned and well handled. We respectfully call to this Court's attention the clear, concise and informative testimony of the commanders of the Coast Guard vessels which appears at pages 386-428 of the Apostles on Appeal. Despite the cogency of that testimony which is not seriously

disputed by the libelants, the trial Court awarded \$24,750 to the SEA FOX and only \$15,000 to the government vessels. The excessiveness of the SEA FOX award is perhaps best disclosed by a chronological listing of the efforts of each vessel. In reviewing the services performed by each vessel we wish to make it clear that while we believe the ratio of the award as between the SEA FOX and Puget Sound interests was indicative of the relative quantum of service rendered by each, we are satisfied that the awards to both the Shipowners and Puget Sound are excessive. So far as this present discussion is concerned the SEA FOX and Puget Sound interests are on the same footing but only the SEA FOX interests are before this Court. In the following summary the services rendered by all vessels, the WINONA, BALSAM, SEA FOX and HERCULES are fairly stated. There is only brief mention of the NEPTUNE because she sank before she could render any services of benefit to the HERALD.

SEA FOX

Government Vessels

November 14

1900 advised HERALD she had radioed for aid.	2140 hours BALSAM arrived at scene from Astoria, Oregon.
--	--

November 15

Tow line still secured to HERALD.	BALSAM stood by tug and tow all that day.
-----------------------------------	---

November 16

0040—Tow line broke. SEA FOX stood by until 0920 when, on orders from BALSAM she proceeded to and remained in vicinity of the NEP-	BALSAM stood by until 0920 when she supplied collision mats to plug hole in side of NEPTUNE and picked up the crew of the sinking NEP-
--	--

SEA FOX

TUNE until NEPTUNE sank at about 1632 hours and then returned to vicinity of HERALD at 1710 hours.

1930—Told HERALD to drop anchor and to let out nine shots of chain. This order was obeyed by HERALD.

Government Vessels

TUNE. Thereafter stood by the HERALD and put a 10'' manila tow line to HERALD at 1515 hours.—Commenced to tow the HERALD but the line soon parted. Stayed in vicinity of HERALD.

1930 hours—directed SEA FOX by radio to tell HERALD to drop HERALD's anchor at time when HERALD was at the 35-fathom line. Depth of water was disclosed by "fathometer" aboard BALSAM. The U.S.S. PRAIRIE, a Navy destroyer tender, came to the vicinity this day but did not remain on being told by the Coast Guard vessels her services were not required.

November 17

SEA FOX received bitter end of 12'' line and thereafter kept a strain on it to ease strain on HERALD's anchor.

0440—Coast Guard WINONA arrived at scene. In morning put a 12'' manila towing line to HERALD and transferred the bitter end to the SEA FOX. BALSAM and WINONA remained at scene.

1350—WINONA left for Astoria to put NEPTUNE's crew ashore.

2312—WINONA returned to the vicinity of HERALD. On instructions from BALSAM the HERALD dropped her starboard anchor chain overboard. WINONA and BALSAM remained in vicinity balance of day.

SEA FOX**Government Vessels****November 18**

SEA FOX holding strain on the 12" manila line. After the HERCULES put its towing line to the HERALD at 0830 hours, SEA FOX and HERCULES were in "irons".

WINONA and BALSAM standing by. HERCULES arrived about 0300 hours and shortly thereafter the WINONA departed when Captain Eastman of the BALSAM considered the situation was in hand.

HERALD was unable to lift its port anchor and tugs were in "irons", so BALSAM sent acetylene cutting torch to HERALD. Anchor line cut permitting HERCULES and SEA FOX to get out of "irons".

1115 hours—tow toward Everett, Wn. resumed with SEA FOX and HERCULES towing.

1115—tow resumed and BALSAM remained with tug and tow.

November 19

HERALD in tow of SEA FOX and HERCULES. Arrived safely at Everett, Wn. at about 2130 hours.

BALSAM remained with HERALD until 1005 hours when the convoy was in smooth water in the Straits of Juan de Fuca. Thereafter BALSAM proceeded to sea.

(If the Court should desire a more detailed summary of the events of the entire voyage, reference is respectfully made to Appendix "A" hereto.)

Without the assistance of BALSAM and WINONA, of what value was the SEA FOX to HERALD after the tow line parted on the 16th? It is true that SEA FOX (1) stood by HERALD and on instruction of BALSAM stood by NEPTUNE while latter was sink-

ing; (2) relayed instructions from BALSAM to leave HERALD drop her anchor on late evening of 16th; (3) took bitter end of WINONA's 12" towing line on morning of 17th and thereafter eased strain on HERALD's anchor, and (4) assisted HERCULES in towing HERALD into Puget Sound. Nevertheless, SEA FOX was helpless alone. She had no usable towing line aboard. She had no cutting equipment aboard. Her towing engine was broken down. It is fair to state that but for the services and equipment supplied by WINONA and BALSAM the services of SEA FOX would have been worthless.

An overall award of \$60,000 for *all* interests while high, is not too far out of line. An allowance of only \$15,000 to the government vessels as compared with \$24,750 to SEA FOX is clearly erroneous. Under the *undisputed* facts in this case, this Honorable Court must of necessity arrive at a definite and firm conviction that a mistake has been committed in this regard.

It is obvious that the trial Court erred in granting too great a share of the overall award to SEA FOX. It is equally obvious that the trial Court erred in failing to make *any* deduction from the award to SEA FOX by reason of the tug/tow relationship.

FOURTH SPECIFICATION OF ERROR.

The District Court erred in dismissing the cross-libel. Assignment of Errors, numbered 2, 3, 13, 14 and 15 (Apostles on Appeal, pages 76-78).

The merits of the question raised by this specification of error are discussed at large under Waterman's First and Second Specifications of Error and we respectfully request that the Court consider at large under this heading the discussion previously offered under the First and Second Specifications.

The HERALD was placed in her position of peril by reason of the negligence of Shipowners. This negligence has heretofore been fully discussed. It is now necessary only to discuss the questions raised by the District Court's conclusion (Apostles on Appeal, page 69) that Waterman, this appellant, is estopped from claiming or contending that the hull insurance on the HERALD did not inure to the benefit of the SEA FOX or that said hull insurance did not release the tug SEA FOX from liability.

We refer first to clause 8 of the towage contract (Apostles on Appeal, page 293). Under that clause Everett-Pacific Shipbuilding and Drydock Co. was obligated to secure insurance on the HERALD for the benefit of the SEA FOX or failing that to itself become the insurer of the HERALD, both for itself and for the SEA FOX interest. We do not discuss the validity of this contractual provision. It is necessary only to point out that Shipowners were not added as assured to Waterman's hull policies and that whatever Everett-Pacific did or did not do in pursuance of this clause not only does not appear in the record but can be of no concern insofar as this appellant, Waterman, is concerned. Shipowners is liable to Waterman for the negligence of the SEA FOX, and the

fact that Everett-Pacific may be liable to Shipowners for having failed to insure Shipowners cannot bar Waterman from obtaining the recovery from Shipowners to which it is entitled. We frankly admit that we are wholly unable intelligently to discuss the matter of "estoppel" as used in this context since Waterman was required to do nothing under the towage contract and did nothing under the towage contract.

The remainder of this conclusion of the District Court relates to Shipowners' contention that since for its own benefit Waterman paid a premium of $1\frac{1}{8}\%$ (with release of tug) instead of 1% (no release of tug) Waterman is estopped from asserting the invalidity of clause 4 of the towage contract (First Specification of Error herein) even though Waterman was not a party to the towage contract. The invalidity of such clauses is clearly established but it is the added legal expense such as has been caused in this case by the "release of tug" clause that justifies the exaction of an additional premium when such towage contracts are employed. The terms and conditions of Waterman's insurance have no proper place in this case and have no bearing on any issues before either this Court or the District Court. There is no contention that Waterman was obligated to do anything under the towage contract or that it did anything it shouldn't have done or failed to do anything that it should have done and in such circumstances there can be no estoppel.

In this case Waterman tendered to Shipowners the defense of the claims for salvage being asserted

against the HERALD. The tender was not accepted by Shipowners, and thereafter Waterman filed a cross-libel against Shipowners in which Waterman sought to recover its damages and counsel fees in defending the claims for salvage. The claims for salvage arose solely by reason of the breach of the towage contract by Shipowners and the negligence of Shipowners and therefore the ultimate responsibility for payment of such salvage services rests on Shipowners. The cross-libel therefore should not have been dismissed.

The law is clear that a shipowner who solely because of his ownership of a vessel is held liable for a claim where the fault is that of a third person may recover over against that third person not only the amount so paid but also his attorney's fees and expenses of defending the original claim.

Standard Oil Co. v. Robins Drydock, Etc. Co.

(C.C.A. 2, 1929), 32 F. (2d) 182;

Rederi v. Jarka Corporation, 82 Fed. Supp. 285;

The C. F. Ackerman, 5 Fed. Cas. No. 2562.

On reversal of the judgment of the trial Court dismissing the cross libel, we request that this matter be remanded to the trial Court for proof of Waterman's damages, expenses and attorney's fees in awarding judgment on the cross libel against Shipowners.

CONCLUSION.

We respectfully urge:

1. SEA FOX interests should recover nothing for alleged salvage services.
2. It was reversible error to dismiss the cross libel against Shipowners.
3. The case should be remanded to the trial Court to determine the amount of damages recoverable by Waterman and with instructions to award judgment in favor of Waterman on its cross libel because of statutory fault and other acts of negligence by SEA FOX.

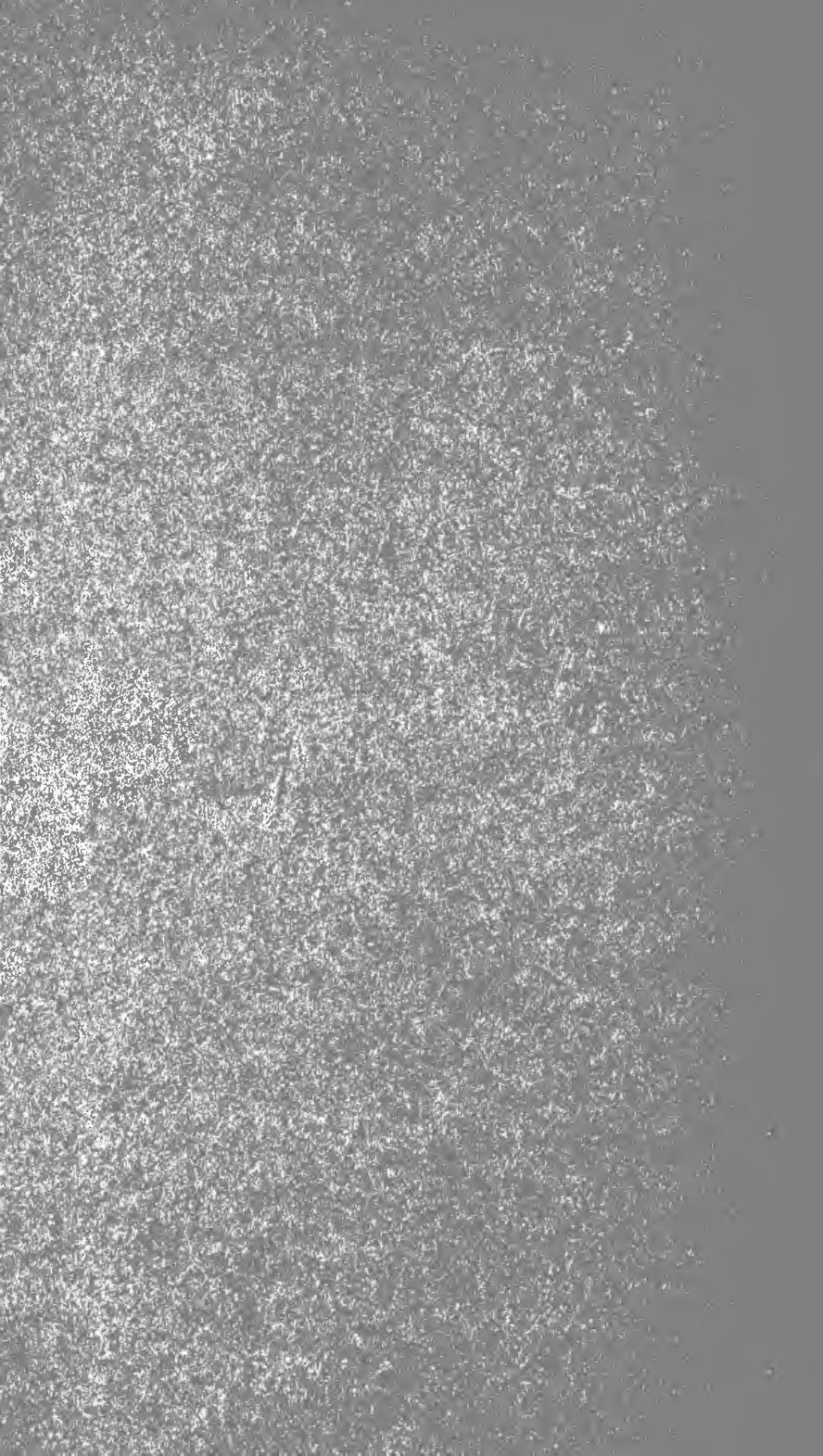
Dated San Francisco, California,
January 28, 1952.

Respectfully submitted,
GRAHAM & MORSE,
CLARENCE G. MORSE,
FRANCIS L. TETREAULT,
Proctors for Appellant.

(Appendices "A", "B" and "C" Follow.)



Appendices.



Appendix "A"

November 3, 1948

The SEA FOX and HERALD were surveyed by the Board of Marine Underwriters and were fit to proceed on the tow but with the express proviso that the SEA FOX should take "advantage as much as possible of favorable weather" (Libelants' Exhibit 7). The tug and tow were originally scheduled to leave San Francisco Bay on

November 4, 1948,

but because of threatening weather conditions, Shipowners concluded to delay the departure (Apostles on Appeal page 34). At time of departure the SEA FOX had its towing wire, which was about 1200 feet total length, secured to the HERALD and had aboard a spare or "insurance" wire of the same length. In addition, the SEA FOX had a used 600 ft. wire aboard which, even on libelants' testimony, was useable only in an emergency. The SEA FOX did leave on

November 5, 1948.

Satisfactory progress was made until

November 7, 1948,

when the towing line carried away at 1450 hours in relatively moderate weather. The SEA FOX log then indicating a fresh to strong breeze or wind force of force 5 or 6 on the Beaufort scale or 9 to 27 miles per hour. Eventually the SEA

FOX put its spare or "insurance" tow wire to the HERALD but this tow wire became kinked on the winch drum on the SEA FOX. The entire wire was cut off the drum and thrown overboard, and the HERALD drifted until

November 8, 1948,

at 1515 hours, when the Tug SEA PRINCE came from San Francisco and towed the HERALD into Drake's Bay. At Drake's Bay on instructions of SEA FOX, the part of the anchor chain which was hanging in the water (some 45 fathoms) and the SEA FOX's original towing wire were dropped to the bottom of the ocean and abandoned. At Drake's Bay the SEA PRINCE's towing wire was shackled to the HERALD's anchor chain and some 45 fathoms of chain was run out from the HERALD. The broken fairlead traveller on the SEA FOX was not repaired. Thereafter the SEA PRINCE's towing wire was transferred to the SEA FOX, and on

November 9, 1948,

at 0100 hours, SEA FOX and HERALD resumed the voyage. After leaving Drake's Bay the SEA FOX had no insurance wire but only the short length in addition to the wire in use. It was a wire to be used only in an emergency (Apostles on Appeal page 160). In respect to this short wire, Captain Eastman of the WINONA testified that on the 17th (Apostles on Appeal page 392):

“The SEA FOX stated that they could take the HERALD OF THE MORNING in tow but that they had no towing hawser, as they had broken their hawser.”

The weather remained moderate until

November 12, 1948,

and the voyage continued. On this date the weather was generally a “gentle breeze”, force 3. On

November 13, 1948,

the SEA FOX overheard weather bureau forecasts of impending storm off the Columbia River and Washington coast. The broadcast recited (Respondent’s Exhibit H; Apostles on Appeal page 340):

“Southeast storm warnings ordered displayed Washington Coast and Mouth of Columbia, small craft warnings south of Astoria to Cape Blanco and over inland waters of Washington 3:00 PM for southeasterly winds 35-45 mph Washington Coast, and 25-35 mph Oregon Coast tonight, shifting to westerly early Sunday and decreasing, and southerly winds 20-30 mph over inland waters.”

The SEA FOX knew of the approach of the storm which they thereafter experienced during the following days (Apostles on Appeal page 194). On this date the weather was a gentle breeze most of the day but blew up to a strong breeze prior to midnight. On

November 14, 1948,

the weather was a "fresh gale", force 8 (37 miles per hour) at 0800 and a "fresh breeze" or a "strong breeze", force 5 and force 6 for most of the balance of the day (17 to 27 miles per hour). At 1900 hours the SEA FOX advised HERALD she had called for aid from the Coast Guard and that her towing engine had broken down. At 2030 hours the Coast Guard cutter BALSAM arrived in the vicinity of the HERALD. At this time HERALD was 17 miles distant and nearly southwest of the Columbia River lightship (Apostles on Appeal page 409). On

November 15, 1948,

the BALSAM stood by all day and at 2200 hours the tug NEPTUNE arrived in the vicinity and hailed the HERALD and thereafter stood by. During the day of the 15th the wind was "gentle breeze" to "moderate breeze" (force 3 and force 4 most of the time), but built up to a "strong gale", force 9 (44 miles per hour) near midnight. Then on

November 16, 1948,

at 0040, the tow line to the SEA FOX parted. Shortly thereafter the NEPTUNE attempted to shoot a line to the HERALD from the lee side but soon gave up on account of darkness and existing weather. Before daylight on the morning of the 16th the wind was severe, a "whole gale" (force 10, or 52 miles per hour), thereafter quiet-

ing down to a "moderate breeze" (force 4 or 14 miles per hour). During the first eight hours of November 16th the wind was approximately twice as strong as it had been (Apostles on Appeal page 413). At 0920 when the wind was a "moderate gale", force 7 or 30 miles per hour, the NEPTUNE maneuvered on the weather bow of the HERALD and got a messenger line aboard, but while getting the wire line aboard the HERALD maneuvered too close on the weather bow of the HERALD which was lying in the trough of the sea, and was thrown by a wave against the HERALD's bow, holing NEPTUNE's hull, resulting in her sinking several hours later. At 1515 hours this same date the BALSAM put a 10" Manila line aboard the HERALD, but it soon parted at the splice. On instructions from the BALSAM the SEA FOX remained with the NEPTUNE. The SEA FOX did not return to the HERALD until about 1710 hours (Apostles on Appeal page 418). The HERALD continued to drift until 1930 hours when the HERALD, on orders from the BALSAM, relayed to the HERALD by the SEA FOX (Apostles on Appeal page 248), dropped her port anchor and thereafter rode at anchor some 10 to 12 miles from shore (Apostles on Appeal page 264). This distance of 12 miles offshore is confirmed by Captain Eastman of the WINONA, whose log for November 18 recites the HERALD was at anchor

at the 35-fathom line and whose log also gives bearings to two shore points which fixes the position of the HERALD. On

November 17, 1948,

at 0440 the WINONA arrived at the scene (Apostles on Appeal page 418). The HERALD "was in no immediate danger" (Apostles on Appeal page 392); during that morning the WINONA placed a 12-inch Manila line aboard and thereafter transferred the line to the SEA FOX. Captain Eastman considered this 12-inch hawser to be adequate to tow the HERALD, stating (Apostles on Appeal page 401):

"* * * in my estimation, a Manila hawser that is long gives you a catenary which acts as a cushioning effect when towing in a seaway."

On this date, with minor exceptions, the wind was a "gentle breeze" or force 3 (18 miles per hour). On this day the HERALD let go the balance of its starboard anchor chain which, although buoyed, was never recovered. At 1350 hours the BALSAM left the area to take the NEPTUNE's crew to shore, and the SEA FOX and WINONA stayed with the HERALD. The BALSAM returned at 2312 hours (Apostles on Appeal page 423). On

November 18, 1948,

the HERCULES arrived at the scene at about 3:00 a.m. (Apostles on Appeal page 255) and shortly thereafter the WINONA departed, when

Captain Eastman of the WINONA "considered that the BALSAM and the SEA FOX could adequately handle the situation" (Apostles on Appeal page 397). At 0800 hours the HERCULES put a towing wire aboard the HERALD. During the morning, the wind was a "gentle" or "moderate" breeze; at time of departure for Everett it was a "fresh breeze", force 5, and so remained (except at 4:00 p.m. and at 7:00 p.m., when it was force 6, a "strong breeze") until 9:00 p.m., when for two hours it was a "strong gale", force 9, thereafter quickly moderating. The HERALD was unable to release the port anchor chain because the strain prevented the release of the pelican hook, and as a result the tugs were more or less in irons. Accordingly, the port anchor chain of the HERALD was therefore cut, with the aid of the portable cutting equipment supplied by BALSAM and at 1115 hours resumed voyage in tow of HERCULES and SEA FOX toward Everett, Washington, where she arrived without further incident on

November 19, 1948.

On this date the weather was calm (force 0) to a "gentle breeze" (force 3). The tugs and tow were all fast at Everett, Washington, about 9:30 p.m.





Appendix "B"

Beaufort Scale

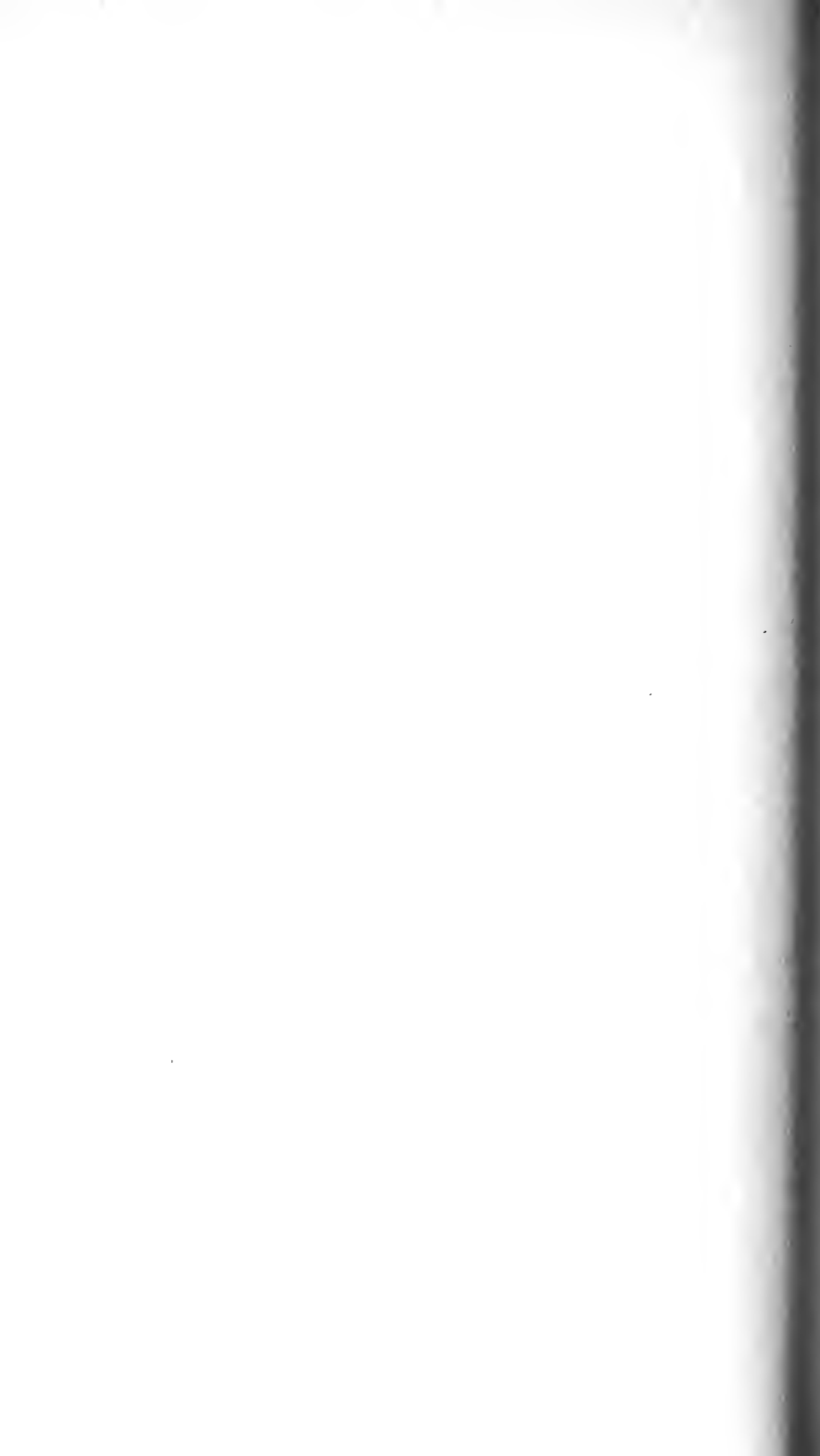
Admiral Beaufort's Numbers	Average of Velocity in nautical miles per hour (knots)	Limits of Velocity	Seaman's Description of Wind
0	0	Less than 1	Calm
1	2	1 to 3	Light air
2	5	4 to 6	Light breeze
3	9	7 to 10	Gentle breeze
4	14	11 to 16	Moderate breeze
5	19	17 to 21	Fresh breeze
6	24	22 to 27	Strong breeze
7	30	28 to 33	Moderate gale
8	37	34 to 40	(half a gale) Fresh gale
9	44	41 to 47	Strong gale
10	52	48 to 55	Heavy gale
11	60	56 to 65	(whole gale) Storm
12	Above 65	Hurricane

Appendix "C"

SEA TOWS BY TUG "SEA FOX" DURING 1948— R. T. SOMMERS

6/30/48	OIL BARGE	230x46x16	3500 T. Cargo	San Francisco to Coos Bay, Ore. and return S. F.
7/ 8/48	"	"	" " " "	San Francisco to Eureka, Cal. and return S. F.
7/14/48	"	"	" " " "	San Francisco to Coos Bay, Ore. and return S. F.
7/22/48	"	"	" " " "	San Francisco to Eureka, Cal. and return S. F.
7/26/48	"	"	" " " "	San Francisco to Coos Bay, Ore. and return S. F.
8/13/48	SS YOUNG AMERICA	435x63x31		San Francisco to Everett, Wash.
8/28/48	SS COMET	435x63x31		San Francisco to Astoria, Wn. (sic)
10/20/48	OIL BARGE	230x46x16	3500 T. Cargo	San Francisco to Eureka, Cal. and return S. F.
11/ 5/48	SS HERALD OF THE MORNING	435x63x31		Oakland to Everett, Wash.

(Supplied by R. T. Sommers pursuant to request
and agreement during trial.)



No. 13,135

IN THE
United States Court of Appeals
For the Ninth Circuit

WATERMAN STEAMSHIP CORPORATION,
a corporation,

Appellant,

vs.

SHIPOWNERS & MERCHANTS TOWBOAT Co.,
LTD., a corporation, and Tug SEA FOX,
INC., a corporation, on their own behalf
and on behalf of the Master, Officers
and Crew of the Tug Sea Fox,

Appellees.

BRIEF FOR APPELLEES.

FILED

FEB 29 1952

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IN THE
United States Court of Appeals
For the Ninth Circuit

WATERMAN STEAMSHIP CORPORATION,
a corporation,

Appellant,

vs.

SHIPOWNERS & MERCHANTS TOWBOAT Co.,
LTD., a corporation, and Tug SEA FOX,
INC., a corporation, on their own behalf
and on behalf of the Master, Officers
and Crew of the Tug Sea Fox,

Appellees.

BRIEF FOR APPELLEES.

PRELIMINARY STATEMENT.

Appellant's statement as to the admiralty jurisdiction of the District Court and the appellate jurisdiction of this Court of Appeals is entirely correct. Its "statement of the case" is generally correct as far as it goes, although slightly colored in one or two places. We accept the gage of battle as laid down in appellant's statement of the issues involved, and, with one exception, will discuss appellant's specifications in the same order in which they are presented in its opening brief.

The exception relates to the issue of the tug's exoneration from responsibility for fault. As we see it, both the language of the towing contract *and* the over-all contractual arrangements operate together to prevent the tug's conduct being called into question. Appellant has separated this issue into two parts, however. Its first specification of error (pp. 8-9 of its opening brief) discusses solely the language of the towage contract, while the insurance arrangements are discussed under the fourth specification (appellant's opening brief, pp. 40-42).

Since both the towing contract and the insurance arrangements operated together to shield the tug from a charge of negligence, we believe that both should be discussed together, and we propose to do so in this brief.

With that one exception, we will answer appellant's points in the same order as they are presented in its opening brief.

ARGUMENT.

I.

THE TOWAGE ARRANGEMENTS LEGALLY EXONERATED THE TUG FROM RESPONSIBILITY FOR ERRORS IN NAVIGATION OF TUG AND TOW.

Appellant's first specification (appellant's opening brief, pp. 8-9) argues that a clause in a towage contract exonerating the tug from liability for negligence is void, citing *Compania de Navigacion v. Fireman's Fund (The Wash Gray)*, 277 U.S. 66, 72 L. Ed. 787, and *Mylroie v. Brit. Col. Mills*, 268 Fed. 449 (9th Cir.).

The latter case went to the Supreme Court, which decided the cause upon other grounds, the Supreme Court saying:

“This makes it *unnecessary* for us to consider the contention on behalf of the barge, that the exemption clause is void.”

Brit. Col. Mills v. Mylroie, 259 U.S. 1, 12; 66 L. Ed. 807, 814.

The Wash Gray, 277 U.S. 66, 72 L. Ed. 787 (supra), held ineffective a clause that towage was at the risk of the tow, but did so in such terms that it is not entirely clear whether the Supreme Court meant to hold that the clause should not be construed, as a matter of language, to provide for exoneration for negligence, or to hold that such an exonerating clause is void as a matter of law.

We have no intention, however, of trying to argue the issue of whether a tug can validly stipulate for complete exoneration from the consequences of its own negligence, since that issue is not presented here. The clause here in question is not a blanket one, but is limited in scope and effect. And, coupled with that clause, there is the matter of insurance arrangements knowingly made by all parties.

In considering the validity of these arrangements, it should be kept in mind that a tug is not a common carrier, and *is not even a bailee*. *Stevens v. The White City*, 285 U.S. 195, 76 L. Ed. 699.

The first point to be noted is that the clause here in question is confined to “faults or errors in the navigation or management of tug and tow” (clause 4 of towage con-

tract. Apostles, 292). The clause is worded precisely within the exemptions which are granted even to common carriers, by the Harter Act (46 U.S. Code 192) and the Carriage of Goods by Sea Act (46 U.S. Code 1304).

While carriers are given the right by statute, these statutes evidence a public policy in favor of such exonerations which should apply here to sustain the validity of the relieving clause in the towage contract.

Limited exoneration clauses have been upheld in a number of situations. Thus, in *New Haven Trap Rock Co. v. U. S.*, 15 F. Supp. 619 (D. Mass.) the contract between scow owner and respondent provided that respondent should be responsible for all accidental damage to the scow except such as is ordinarily covered by insurance. The clause was held effective to relieve respondent for insurable damage caused by its negligence.

In *Berwind-White Co. v. U. S.*, 15 F. (2d) 366 (2nd Cir.), a demise charter (i.e., a *bailment*) provided that the barge owner assumed marine and other risks, including P. and I. risks. While in the Government's possession as bailee, the barge was damaged by the negligence of an Army tug. The clause was held valid to relieve the Government from liability.

The history of the contractual arrangements in this case is shown in the record as follows:

On October 27, 1948, the Maritime Commission offered to sell the *Herald* to Waterman for the statutory price, less various allowances for converting her back to merchant type, on condition that Everett-Pacific Co. get the

reconversion job and be named as an assured on the hull policies during transfer of the vessel from the San Francisco Bay area to Everett, Wash. (Apostles, 278-9.)

Waterman accepted this proposal by telegram of October 28, 1948 (Apostles, 280), and, on the same date, wired Everett-Pacific that they could have the reconversion job if they agreed to transfer the vessel at their expense. (Apostles, 281.) Everett-Pacific accepted this offer the same day, their reply telegram to Waterman saying, "expense of preparing for tug and towing for our account except *insurance*, which for *your account* * * *" (Apostles, 282.)

On October 29, 1948, the Commission, by telegram, confirmed Waterman's understanding that Waterman was to cover the *Herald* by marine insurance, naming Everett-Pacific as a co-insured, and that *Waterman's expense for such insurance would be allowed as a further deduction from the price it would owe to the Commission*. (Apostles, 283.)

Then Sudden & Christenson, San Francisco agents for Waterman, wired Everett-Pacific on October 29, 1948, that they were willing to act as agents of Everett-Pacific in preparing the *Herald* for towing, and requested Everett to send two copies of the towage agreement, "*this necessary satisfy salvage association and enable owner arrange towage risk insurance; we believe standard form towage contract is with release of tug from any and all liability* * * *" (Apostles, 284.)

On November 1, 1948, the towage contract was made between libelant and Everett-Pacific, represented by Sud-

den & Christenson. Paragraph 8 of that towage contract (Apostles, 293) provided that:

“By endorsement thereon or otherwise, and without any right of subrogation against it, First Party (i.e., libelant) shall be made an additional assured in Second Party’s insurance policies covering the tow * * * during the towage service, and, if Second Party does not so add First Party as an additional assured, or fails to provide for the aforesaid waiver of subrogation or fails to insure the tow, then Second Party agrees to be the insurer thereof for both parties. * * *”

The policy itself, No. 48-1299, is in evidence as libelant’s exhibit 5 (not printed). It is issued by American Hulls Syndicate and covers several ships, including the *Herald*, the *Young America* (previously towed by the *Sea Fox* from San Francisco to Everett) and the *Dashing Wave*. It covers salvage services rendered to any insured vessel, even though rendered by another vessel belonging to the assured, and, by indorsement, names Pacific Car & Foundry Co., doing business as Everett-Pacific Shipbuilding Co., as an assured in addition to Waterman.

The policy does not name Shipowners as an assured, but does contain these significant features:

1. As admitted by Waterman in answer to interrogatories (Suppl. Apostles, 381-2), an addendum to the policy provided that trip in tow premium for marine risks was “ $1\frac{1}{8}\%$ (with release of tug), or 1% (no release of tug).” In fact, the higher rate of $1\frac{1}{8}\%$ was paid by Waterman to the insurers.

2. Another addendum to policy 48-1299 (libelant's exh. 5) covers various trips in tow made by the *Herald*, such as from the lay-up berth in Suisun Bay to Moore Dry-dock, San Francisco, and from there to Pier 16, War Assets, Oakland. For the trip from Oakland to Everett, this addendum increases the insured value to \$1,054,000, states a premium of $1\frac{1}{8}\%$, or \$11,857.50, and bears the notation, "*Towing tug and/or tugs released of liability.*"

In answers to interrogatories (Apostles, 34-36), Waterman admitted as follows:

1. That "pertinent particulars of towage arrangements and contract were furnished by Waterman to its brokers *who arranged the insurance.*" (Suppl. Apostles, 384.)

2. That Article 25(b) of the reconversion contract between Waterman and Everett-Pacific exonerated the latter from liability for damage to the *Herald* during the trip caused by negligence of Everett-Pacific *or its subcontractors.* (Apostles, 382-3.)

Thus we have here no contract depriving an uninsured shipowner of recovery from a negligent tug, in any sense. We have a case where, in order to avoid controversies among themselves, the interested parties agreed to take out full insurance to protect *all* interests, and waived any claims back and forth among themselves, all with the knowledge and consent of the insurers, who issued the policy knowingly, and *who charged and received a higher rate of premium for waiving subrogation against the tug.*

In summary:

1. Waterman agreed with Everett-Pacific to waive claims against the latter, and obtained insurance covering both their interests during the *Herald's* trip up the coast.

2. Everett-Pacific (represented by Sudden & Christenson, who were also Waterman's agents) agreed with libelant to release the latter from responsibility for errors in management and navigation, and agreed to have libelant endorsed on the hull policies as an assured or to obtain a waiver of subrogation.

3. Waterman advised its brokers of the terms of the towing contract and, presumably, the brokers so notified the underwriters, since the policy and its attachments show that the movement was "towing tug released from liability," and that *a higher rate was charged and received by the insurers from Waterman for thus waiving claim against the tug.*

In other words, the contractual arrangements as a whole amounted both to a waiver by the underwriters of the right to hold the tug for negligence, and an agreement by Waterman and Everett-Pacific to give the tug the benefit of their insurance. Both types of agreement are valid and enforceable.

It is a general principle of law that parties to a contract can always avoid controversies between themselves by agreeing to take out insurance to cover possible losses. Even a common carrier can lawfully stipulate for the benefit of the shipper's insurance. *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U.S. 312, 29 L. Ed. 873. The

decision in *Luckenbach S. S. Co. v. McCahan Co.*, 248 U.S. 139, 63 L. Ed. 170, recognized this rule, and refused to apply it *only* because the policy *prohibited* such a clause, and the money was not “paid,” but was “advanced” to the shipper under a loan receipt.

In this case there was an express *consent* by the underwriters to the tug’s receiving the benefit of insurance, since a higher rate was quoted for releasing the tug from responsibility, and that *higher rate was actually paid*. The case is thus analogous to *Newport News Co. v. U. S.*, 34 F. (2d) 100 (4th Cir.) (Cert. den. 280 U.S. 599, 74 L. Ed. 645), where the agreement of the shipowner to keep hull policies in force was held to exonerate a repair yard from liability for negligently causing fire damage to the vessel.

At pages 40-41 of its opening brief, appellant Waterman points out that it was not a party to the towage contract between Everett-Pacific and libelant, and professes to be unable to answer the estoppel argument which libelant made below. That statement ignores the realities of the situation and the history of appellant’s own actions in this case.

Next, appellant offers the amazing explanation that it paid an insurance premium of “1 $\frac{1}{8}$ % with release of tug” rather than “1% no release of tug”, because, although such an exonerating clause in the towage contract is void, it costs money for legal expenses in getting the Court to rule the clause invalid, and that is why the insurers charge more premium when the towage contract contains such a release!

This contention is so naive that it is difficult to take it seriously. It does confirm what libelant has contended throughout—that the hull underwriters, not Waterman, are the ultimate party in interest here, since the policy covers salvage charges incurred by the *Herald* on this trip. Waterman can hardly claim that it paid a higher premium *to* the underwriters because it, Waterman, would have an extra legal expense in setting aside the release-of-tug clause. If its argument means anything, it means that underwriters charged a higher premium because *they*, the underwriters, would have extra legal expense in setting the clause aside.

Thus appellant's explanation of the extra $\frac{1}{8}$ of 1% charge is an admission that underwriters, not Waterman, are defending this case and will have to pay the salvage award to libelant. And appellant is thus arguing, in effect, that the underwriter didn't really mean it when he noted "towing tug released from liability" on the addendum to the policy that covered this trip. The law permits an insurer to waive subrogation, and that is exactly what the underwriters did here, with full knowledge and in exchange for a higher premium, whose amount they, themselves, fixed.

At the risk of being repetitious, let us set down briefly what appellant, itself, did:

1. Waterman released Everett-Pacific from liability during the trip and had that company added as a named assured on the policy.

2. Waterman requested copies of the towing contract, so that it could arrange for insurance, stating that it was

understood the standard towing contract provided for release of tug.

3. After learning of the towage contract and the release clause therein, Waterman gave this data to its brokers to get the necessary policy endorsements.

4. The underwriters named a figure of $1\frac{1}{8}\%$ as the premium required if the tug was released from liability, and Waterman paid that premium.

As to the underwriters,

(a) They knew that the towage contract released the tug, and that it contained an express agreement by Everett-Pacific (a named assured) to give libelant the benefit of the insurance.

(b) With this knowledge, they quoted a premium of $1\frac{1}{8}\%$ instead of the 1% which they would have charged if there had been no release of the tug.

(c) They accepted this higher premium.

(d) On the policy endorsement covering this trip in tow they placed a notation, "towing tug released from liability."

Thus one of the named assureds (Everett-Pacific), with the knowledge and consent of the other (Waterman), formally agreed to give libelant the benefit of the insurance, while Waterman paid the insurers an extra premium to waive subrogation against the tug, and the insurers knowingly charged and accepted that higher premium and *waived subrogation* in writing on the policy.

We submit that, as the just and intended result of these dealings, both Waterman and the underwriters are

estopped from questioning the tug's conduct either by way of cross-libel or by way of attempted defense to libelant's claim for salvage.

II.

THE DISTRICT COURT PROPERLY FOUND THAT CAPT. SOMMER'S FAILURE TO HOLD A MASTER'S LICENSE FOR THE HIGH SEAS DID NOT AND COULD NOT HAVE CONTRIBUTED TO THE CIRCUMSTANCES GIVING RISE TO SALVAGE SERVICES.

Appellant's second specification refers to Section 224a of Title 46, *U. S. Code*, and argues that, under the "*Pennsylvania* rule", libelant failed to discharge the burden of proving that Capt. Sommer's lack of ocean-going license could not have had any causal relation to the situation in which salvage services became necessary. (Capt. Sommer had a Master's license for Bays and Rivers, but not for Oceans.)

Our first observation is that it is by no means clear that even a technical violation of 46 *U. S. Code* 224a took place. Article 3 of the Convention (1938 A.M.C. at 1285) merely requires the officers to hold "certificates of competency." Section 224a of 46 *U. S. Code*, subsec. 3, provides that *any* license issued to a master *shall be deemed a certificate of competency within the requirement of the Convention*. Also, Section 224a continues in effect all previous laws concerning licenses "to such extent and upon such conditions as may be required by the regulations of the Commandant of the Coast Guard."

The regulations of the Coast Guard (46 C.F.R. 62.19) state that "There shall be a duly licensed master on board every *steam* vessel of more than 150 gross tons, or seagoing *motor* vessel of 300 gross tons or over * * * and also upon every ocean and coastwise seagoing merchant vessel * * * and every ocean-going vessel carrying passengers * * *"

The *Sea Fox* is a *motor* vessel (diesel tug) of 282 gross tons (Finding III, Apostles 56) and, being a tug, is not a merchant or passenger vessel as such. Hence it was not required by the quoted regulation to have a licensed master aboard.

In short, no violation of the Convention or statute took place because:

1. There was aboard an officer with an unlimited master's license (Reichel), who took the sights and did the navigating.

2. Capt. Sommer held a Bays and Rivers master's license, and 46 U. S. Code 224a(3) says that "*any* license issued to a master * * * shall be deemed to be a certificate of competency for a master or skipper * * *"

3. Coast Guard regulations did not require a licensed master on this tug.

Even assuming a technical violation of the Convention and/or the statute, however, appellant's discussion overlooks many of the facts and misconceives the situation.

Appellant's argument on this issue blandly assumes that Capt. Sommer had no ability or experience merely because he did not hold some sort of offshore license. The

fact is, as we shall point out shortly, that Capt. Sommer had a great deal of experience with tugboats, and had previously made eight trips up the coast with tows in this same year.

Also, it is admitted that he did have a Master's license for bays and inland waters. Under Coast Guard regulations (46 C.F.R. 10.05-49), Capt. Sommer had thus passed a "satisfactory examination" as to his knowledge of:

- "1. Inland Rules of the Road.
2. Distance off by bearings and run.
3. Speed by revolutions and by observation of landmarks.
4. Chart navigation and piloting.
5. Aids to navigation.
6. Winds, weather and current.
7. Signals: storm, wreck, distress and special.
8. Stability and ship construction.
9. Cargo stowage and handling.
10. Seamanship.
11. Temporary repairs to hull and equipment.
12. Drills and lifesaving apparatus.
13. Ship sanitation.
14. Ship's business.
15. General.
16. Practical chart work.
17. Such further examination of a non-mathematical character as the Officer in Charge, Marine Inspection, may consider necessary to establish the applicant's proficiency."

If Sommer needed another license, he did not need a full ocean or even a coastwise license, but only a license as Master of an uninspected vessel, since the *Sea Fox*, being enrolled and under 300 gross tons, was not "subject to inspection." Subpart 10.15 of Chap. I of 46 C.F.R. governs the licensing of officers on uninspected vessels. The subjects on which a Master of such a vessel is examined are listed in 46 C.F.R. 10.15-31.

The only differences between the requirements for the two types of licenses are that the Master of an uninspected vessel must know the elements of celestial navigation and of navigation at sea. In all other respects, the subjects covered by the two regulations are identical. Thus the only thing which can be said of Capt. Sommer's lack of an offshore license is that he had never passed an examination on celestial navigation. On such matters as distance off shore, speed, chart navigation, piloting, wind, weather and current, seamanship, and aids to navigation, he had passed an examination and received a license.

Any lack of ability in Capt. Sommer as to celestial navigation is utterly immaterial here for two reasons:

1. First Officer Reichel, who held an unlimited ocean license as Master, took the sights and did the navigation.
2. Nothing in the field of navigation had the slightest bearing on the events here concerned. The tug's officers at all times knew her approximate position, and at no time were tug and tow lost. Nor did any of the other vessels have any trouble finding the flotilla. When the

Sea Fox called for help and reported her position, the *Balsam* found her, with no effort, at the expected point.

In any event, what was needed in the skipper of the *Sea Fox* was not a theoretical knowledge of celestial navigation, or general ability as a merchant vessel officer, but skill and experience as a *tugboat* master. A holder of a Master's license for all oceans might be completely unsuitable to captain the *Sea Fox*, for lack of tugboat experience. Capt. Sommer had captained the tug for six years, and had towed eight other vessels up the coast in the six months preceding this voyage. There was no evidence offered to show that Capt. Sommer was incapable in any way.

The District Court, after seeing and hearing Capt. Sommer and the other witnesses on the stand, rendered an opinion in which it discussed the burden of proof allegedly resting on the tug-owner. After first holding that the rule did not apply here, the Court said:

“Assuming, however, that in this case the rule is applicable, the burden of proof *has been carried*, because the evidence clearly shows that the *Herald* was set adrift and carried into a position of danger *solely by violence of the storm.*” (Apostles, 51.)

Paragraph XI of the Findings (Apostles, 64-66), on the uncontradicted evidence, recites that:

1. Capt. Sommer had been Master of the tug *Sea Fox* for six years.

2. He had previously, in the same year, towed eight vessels up the coast from San Francisco, two of them

being of the exact size of the *Herald*, and one of those two having gone to Everett.

3. The tug's Chief Officer, Reichel, was an experienced tug man with an unlimited ocean Master's license, and Second Officer Harris held an unlimited ocean chief officer's license.

4. Sommer and Reichel conferred frequently on operation and navigation, and Reichel took the sights and did the navigation.

5. "Captain Sommer and Reichel were experienced tugboat men and each of them impressed the court as able, competent, courageous and truthful mariners."

6. Sommer's lack of an unlimited license did not and *could not* have contributed to the plight of the *Herald*.

Appellant's argument on this point really boils down to an attack on a few specified acts of the tug, such as her alleged fault in "proceeding without an insurance wire." Those acts must be judged on their merits, uninfluenced by Sommer's lack of an ocean license. If the tug did something wrong, it was at fault even if Sommer had had a license. If it did nothing wrong, it is free from fault although Sommer had no license. In other words, the *conduct of the tug* is to be judged, and is the *sole* criterion.

The difficulty with appellant's approach is that it tries to invoke the *Pennsylvania* rule in a situation where it does not logically apply, thus extending the rule far beyond the bounds of anything required or permitted by

the rationale of *The Denali*, 112 F. (2d) 952, or of any other decision in the books.

In *The Denali*, and in all the cases cited therein, the vessel took action in violation of law, and the violation was a direct and operative factor in the disaster. There was a present relationship or tie-up between the breach of regulation and the casualty, and it was logical to require the offender to disprove any relationship of proximate cause between breach and accident.

Thus, in *The Denali*, the vessel hit a *known and chartered reef* while being operated by an officer who was fatigued by standing longer watches than permitted by law. There was a direct, operative connection between breach and accident, and it was entirely logical to apply the *Pennsylvania* rule. Note, however, that *negligent navigation admittedly existed*, and the question at issue was whether it took place without the owner's privity and knowledge when the owner knew of the unlawful watch bill on the ship, and so knew that the officers would be excessively fatigued at times.

Had there been no negligent navigation in *The Denali*, but a loss by heavy weather, the violation of the watch regulations would have been immaterial. So here, if Capt. Sommers did something wrong as a matter of good seamanship practice, his lack of an ocean license might be relevant. If he did nothing wrong, then his holding or not holding a license is of no relevance or importance. Hence, before the *Pennsylvania* rule could possibly be called into play, appellant must establish some negligence in the conduct of the tug as an operative factor.

Other cases cited in *The Denali* likewise involve collision or stranding or cargo damage occurring while the ship's breach of law or regulation was actively creating a risk of damage and so was an operative factor. The limits of *The Denali* rule are set forth in italics in the printed opinion at p. 955 of vol. 112 F. (2d) thus:

“The rule and presumption * * * control * * * where the vessel has violated the positive command of a safety statute to prevent fatigue in the navigating officer controlling her navigation *at the time that navigation caused the injury.*”

In other words, the *Pennsylvania* rule will apply to Capt. Sommers' lack of an ocean license only if and when it is first established that something wrongly done or omitted by him contributed to the *Herald's* predicament. But in judging whether the tug acted properly or improperly, the burden of proof rests on appellant, and the usual standard of due care and good seamanship must be applied without regard to the license question. It is *not* the law that the same action which would be proper if ordered by a licensed officer somehow becomes improper if ordered by an unlicensed man. The standard is impartial and objective: What would a good seaman have done?

Appellant cites, in support of its argument, *The City of Baltimore*, 282 Fed. 490 (4th Cir.). The opinion in that case shows that the acts of the unlicensed master were, in themselves, negligent. At page 493 of the opinion, the Court points out that the tug there should not have assented to a port overtaking, should have blown a danger signal, and should have heard the earlier signals of the

other ship. The Court therefore held that the conduct of the unlicensed officer “entered into the occurrence”—i.e., *that his actions were negligent.*

The City of Baltimore, then, is not in point here unless and until it is established that Captain Sommers did something he should not have done, or omitted to do something which he should have done. It is not authority for condemning what would otherwise be prudent acts, merely because they were done by an unlicensed man. The issue always is this: did the tug act prudently or negligently?

On that basic issue, appellant attempts to argue that the *Sea Fox* was at fault in these particulars (Appellant’s Opening Brief, p. 22):

1. She proceeded from Drake’s Bay without having on board an extra towing wire of full length.
2. She delayed calling the Coast Guard for assistance.
3. Her towing engine became disabled.
4. She failed to seek a refuge after receiving storm warnings.
5. Sommers “allowed” the tow line to break on November 7, “allowed” another wire to become fouled on November 7, and left Drake’s Bay without checking the towing engine or repairing the traveler.

Incidentally, the very making of these charges is an admission by appellant that the issue as to Capt. Sommers’ competency is to be judged by what he *did*, rather than by the limited extent of his license. Let us now briefly discuss each of the particulars in which Capt. Sommers and the tug are accused of negligence.

1. The "insurance wire" issue.

The *Sea Fox* started from San Francisco with two full wires and a third 600-foot wire. (Reichel, Apostles, 106-7.) The two full wires broke and/or became jammed so that they had to be discarded, and at Drake's Bay the *Sea Fox* obtained a brand new wire from a sister tug. When the flotilla left Drake's Bay, this full *new* wire, in good condition, was attached from tug to *Herald*, and an emergency wire of 600 feet was aboard the tug. (Reichel, Apostles, 109 and 159-60.)

Reichel testified (Apostles, 160) that the 600-foot spare was satisfactory as a spare, and *nobody testified to the contrary*. More importantly, however, the record shows beyond all doubt that the presence of a dozen new 1200-foot wires on the *Sea Fox* would have been of no value whatever in avoiding or lessening the *Herald's* difficulties.

Even *before* the tug's wire to the *Herald* parted, the *Neptune* was on the scene and tried to get a line to the *Herald*. The weather was so severe that she was not able to do so. (Finding V, Apostles, 59; Sprague, Apostles, 197-8; Schmitz, Suppl. Apostles, p. 414.) The *Sea Fox's* wire parted during the night of November 15-16, and in daylight hours the next day, the *Neptune* again tried to get a line to the *Herald*, but was prevented by the weather from doing so. Although she managed to get a heaving line over to the *Herald*, the latter's crew were unable to pull in the towing hawser to make it fast. (Finding V, p. 60 of Apostles; Sprague, pp. 201-4 of Apostles; Sweeting, pp. 330-31 of Apostles.) Subsequently, while still trying to get a line across, the *Neptune* struck the *Herald* and was badly damaged. Once the *Neptune* had been

holed, the *Sea Fox* stood by until she sank, on orders from the Coast Guard. (Finding V, p. 60 of Apostles; Reichel, pp. 130-31 of Apostles; Sommers, pp. 236-7 of Apostles; Schmitz, p. 416 of Suppl. Apostles.)

The *Sea Fox* was thus prevented from trying to pass a line to the *Herald* until she got back to the scene at 5:10 P.M. of the 16th. (Schmitz, p. 418 of Suppl. Apostles.) After ordering the *Herald* to drop her anchor, the *Sea Fox* tried to get a line to the tow with a Lyle gun, but was unsuccessful because of wind and darkness. (Reichel, pp. 133-4 and 177-8 of Apostles.) The next day, November 17, the Coast Guard vessel *Winona* got a 12-inch manila line to the *Herald* and gave the other end to the *Sea Fox*. From then on there was always a line to the *Herald* and her danger was lessened.

In other words, for many hours before and after the breaking of the tow line at 0040 on November 16, the weather was so severe that *no* vessel could get a line aboard the *Herald*, and the *Neptune*, which tried to do so, was sunk in the attempt. During this period it would have been of no avail for the *Sea Fox* to have had one or a dozen spare lines aboard. And, quite obviously, neither the presence of a spare wire nor an ocean license held by Capt. Sommers would or could have prevented the wire from breaking when it did.

As soon as the weather permitted, a line *was* passed to the *Herald*. That this was done by the *Winona* may have operated to reduce the *Sea Fox's* share of the total salvage award, but does not establish any causal relation between the plight of the *Herald* and the alleged inadequacy of the spare wire on the *Sea Fox*.

Appellant's argument on this issue is highly specious, even if we assume that, as a matter of good seamanship, a full length spare wire should have been on the tug when the trip was resumed from Drake's Bay. We are not dealing with a case where the tow was lost or damaged because a tow line parted and no other line was available in time to prevent loss. We have a case where salvage services became necessary *because the tow line broke*. Certainly the presence of six extra wires on the *Sea Fox* could not have *prevented* the breaking of the tow line in use. And once that line parted, the *Herald* was in trouble and needed help. Help was given *just as soon as the weather permitted*, and the *Herald* was saved.

We submit that the "insurance wire" question is completely irrelevant to any issue in this case.

2. The SEA FOX called for help in ample time.

Appellant complains, at page 22 of its brief, that Sommers failed to call for help as soon as he heard storm warnings. Appellant does not even attempt to point out what, if anything, this "delay" had to do with the subsequent events. The truth is that any delay in this respect had absolutely no causative effect on the events of November 16-17.

The forecasts of November 13 quoted on pp. 19-20 and iii of Appendix A in appellant's brief predicted winds of 25-35 m.p.h. off the Oregon Coast for the next day. In fact, the weather was more severe than that, and in the afternoon of November 14, *Sea Fox* called for help. The *Balsam* got the message at 3:50 P. M., left Astoria at 5:15 P.M., and arrived on the scene at 8:30 that same day, and

the weather *moderated* on the 15th. In the evening of the 15th, the *Neptune* arrived, and from then on the weather rapidly grew worse. The hawser from *Sea Fox* parted at 0040 on November 16 (40 minutes after midnight).

How a failure to call for help sooner could possibly have caused *Herald's* predicament is difficult to see. Two other vessels were standing by *long before the tow line broke*, and what could then humanly be done *was done*, with complete success.

3. The disablement of the SEA FOX'S towing engine was not due to fault of any kind.

As required by the towage contract, Everett-Pacific (not libelant) prepared the *Herald* for towage, and both tug and tow were examined by a surveyor for underwriters before they left San Francisco. The survey report (Apostles, 285-288) recites that the surveyor made his examination in the presence of representatives of Everett-Pacific and Sudden & Christenson, and concludes as follows:

“The towing tug is the *Sea Fox* * * * which previously towed the *SS. Young America* from Oakland, Cal., to Everett, Wash. In the opinion of the undersigned, *both tug and tow are fit to proceed* * * *”

This survey is the only evidence offered by appellant, and it confirms the tug's seaworthiness at the start of the voyage. It is corroborated by Capt. Reichel (Apostles, 107), and *there is no evidence to the contrary from anyone.*

The difficulties experienced with the towing engine on November 14 are explained by two very obvious circumstances which appellant's brief fails to mention. The weather became very rough, and the *Herald*, being light, presented a large target to the wind and so was very unwieldy. Although it started the trip with its rudder fixed in an amidships position, the high wind and seas caused it to yaw violently, thereby increasing still further the strain produced by the severe weather. (Reichel, 116, 126, 150; Sprague, 214.)

As the trial judge stated in his opinion (Apostles 40-41),

“During the night of the 13th and on the 14th the tug and tow encountered increasingly heavy weather; the towing board that had been placed on the tug's stern to keep the tow wire from chafing went overboard; the towing engine's gears carried away * * *”

Chief Officer Reichel of the *Sea Fox* testified (Apostles, 111):

“Oh, the 14th was the day that it began blowing very hard and we lost our towing board over the side * * * And we were encountering tremendous seas and a very heavy blow, and had to throttle down to just bare steerage way. * * *”

The log of the *Sea Fox* (Respondent's Exh. A, not printed) records for the period 8 to 12 P.M. on November 13, “strong SE wind, big sea and swell, tug and ship pitching bad”, and for the 14th, at 7 A.M., in connection with the breaking of the gear teeth on the towing engine,

says, "Wind moderate to fresh SEly gale, heavy seas and large swells. Vessel and tug both rolling heavily."

The log of the Coast Guard cutter *Balsam* (exh. to Schmitz deposition; exh. not printed) for November 14, while she was lying in the relatively sheltered port of Astoria in the morning, shows wind force as SE 6 at 4 A.M. and SE 8 ("fresh gale") at 8 A.M.

In view of this severe weather and the extra strains imposed by the awkward behavior of the *Herald* in her light condition, the District Court very properly found that the breakdown of the tug's towing engine was due to stress of wind and wave.

Incidentally, we note appellant's comment that the *Sea Fox* log for 8 to 12 P.M. of the 13th has an entry which originally read, "towing out of commission", and was changed to read, "towing engine broke". The two entries mean the same thing and there has been no change of substance. We note from the record that the log was furnished to appellant's counsel in Court, and that he made no effort to examine Capt. Sommer or Capt. Reichel on this point.

Whether something else happened to the towing engine late on the 13th, and the gear stripped on the 14th, or whether the gear stripped late on the 13th and the 7 A.M. entry on the 14th is merely an elaboration of the details, we do not know. In either event, heavy weather prevailed at both times, and the trial Court found that to be the sole cause of the breakdown. Appellant has not shown that this finding, based on the testimony given in open Court,

is "clearly erroneous," and has not pointed to any *evidence* at all which would conflict with that finding.

a. **The Fairlead Traveler.**

Appellant argues earnestly that the *Sea Fox* was at fault in leaving Drake's Bay on the 8th without a fairlead traveler, which, appellant says, left the *Sea Fox* "with only half an effective towing engine." This argument is highly specious; it overlooks the function of the traveler and the facts as to what happened thereafter.

The fairlead traveler is a device which spreads the wire back and forth evenly over the drum of the towing engine when a towing wire is being coiled onto the drum. It thus prevents the wire from bunching on one part of the drum, and helps to prevent snarls or kinks. It has no function when wire is let *out* from the drum, and is not needed if only a turn or two is taken in.

As Reichel testified (Apostles, 167), the towing engine of the *Sea Fox* did not automatically take in or pay out line as the strain varied, but it was the practice to *pay out* a few feet occasionally, in order to avoid chafing the same spot on the wire. The traveler has nothing to do with letting out line, hence was not needed at any time after the flotilla left Drake's Bay.

When the gear teeth stripped on the 14th, the entire strain of holding the drum fell on the hand brake, and the hand brake could not do the job alone. This can be understood by comparing the action of the drum and winch of the towing engine to an automobile engine. When a car is parked on a grade, the driver not only sets the

hand brake, but leaves the gears engaged in low or reverse, so that the wheels are connected to the engine through the gears, and the engine acts as a brake to prevent movement of the wheels.

So, on the *Sea Fox*, the drum on which the tow line is coiled is connected to the winch by gears whose teeth intermesh, and the winch helps to prevent the drum turning and paying out all the line. When the gear teeth stripped under the strain of the yawing *Herald* in severe weather, the drum was held stationary only by the hand brake, which could not do the job alone. The drum began to slip, and there was danger that the *Sea Fox* would lose hold of her end of the towing wire. To hold the drum still, it was necessary to wedge a piece of steel between the drum and the fixed part of the winch. (Reichel, 112-113; 169-170.)

Once the drum was so wedged, it could not turn either way. Without the gear teeth to connect the drum and winch, the winch could not turn the drum at all, and no wire could be taken in. Hence the absence of the fairlead traveler had nothing to do with the situation in any way, and *a traveler would have been of no possible use or help.*

Thus the *facts* show that the failure to repair the traveler at Drake's Bay had no possible relationship to subsequent events. During the period from November 8 to 14, there was no occasion ever to use the traveler and the trip proceeded normally and safely. After the gear teeth of the drum stripped, so that it had to be jammed in one position, the traveler *could* not have been used for any purpose.

4. There was no refuge which the tug could seek.

Appellant, in its effort to avoid a just liability for salvage services received, criticizes the *Sea Fox* and Capt. Sommer for failing to seek a port of refuge when storm warnings were received on November 13, or when the teeth on the towing drum carried away on the 14th. Appellant notably omits to specify just *where* such a "refuge" could have been found. In fact, there was *no* available refuge, and appellant's argument is like suggesting that the shipwrecked sailor marooned on a desert isle should consult a doctor for his headaches.

On the 14th of November the tug and tow were southwest of the mouth of the Columbia River (Sommer, 240; Reichel, 166), and the only port available would have been Astoria, inside the Columbia River Bar. The forecast received on the 13th (Apostles, 342) ordered southeast storm warnings displayed "Washington Coast and *mouth of Columbia*," and the second forecast of November 15 (Apostles, 343) again ordered storm warnings from Tatoosh Island to Cape Blanco. The actual weather experienced on the 14th, and from darkness on, on the 15th and 16th, was gales and heavy seas.

In the face of such storm warnings for the Columbia bar and the conditions actually prevailing at sea off the mouth of the river, it would have been foolhardy for a tug with such a difficult tow to attempt crossing the bar, which is admittedly a dangerous place in rough weather. Four experienced tug masters testified unanimously that it would have been risky and very bad seamanship for

the *Sea Fox* to have tried to take the *Herald* across the bar.

Capt. Flagstad, master of the tug *Hercules*, with 35 years' experience, said it would have been bad judgment to try the bar. (Apostles, 259-60.) Capt. Sprague of the tug *Neptune*, with 15 years' experience, testified the bar would have been impassable for such a tow, which is a harder proposition than taking in a ship under her own power. (Apostles, p. 215.) Capt. Reichel, first mate on the *Sea Fox*, testified it would have been imprudent to try the bar on the 13th, 14th, 15th or 16th, and probably impossible to make it. (Apostles, 151.) Capt. Sommer of the *Sea Fox* expressed the same judgment. (Apostles, 239-40.)

The only witness who ventured an opinion to the contrary was Capt. Sweeting of the *Herald*, who glibly explained that crossing the Columbia River bar would have been "most simple," because the wind was from the *northwest*, "practically no wind to speak of," and the bar is protected from a northwest wind. (Apostles, 325.) When he looked at his log and read the weather entries for the 14th, however (Apostles, 325), he recited his observations, made and recorded on the spot, that the wind was from the *south*, *southeast* and *southwest*, varying from force six to eight (from 27 to 40 *nautical* miles per hour, or about 30 to 45 land miles per hour). Force 8 is a "fresh gale".

Capt. Sweeting's recollection on the stand was generally unreliable. He also testified that the weather was just "ordinary" *early* on the 16th, when the tow line

parted (Apostles, 326), and supported that by reading his log entry of southwest winds, force 6, at 4 *P.M.* Then, still under examination by his own counsel, he found an entry of *southerly gales* in his log for November 16, and finally established that entry as relating to 8 *A.M.*, but only after much confusion and some help from his examiner. Even the cold record shows the man's unreliability:

“Q. (By Mr. Morse). Captain, look on the other sheet. I think you will find an entry at 8 a.m.

A. Well, I don't see it. Oh, yes, vessel drifting in southerly gale. No power, helpless. Tug *Sea Fox*—yes. Southerly gale, yes.

Mr. McKeon. What hour is that, Captain?

The Witness. That is 8 a.m. No. Yes. No, no, that is 8 at night. That is 8 at night.

Q. (By Mr. Morse). Isn't that 0800, Captain?

A. Sir?

Q. Isn't that 0800?

A. Yes, 0800. That's right, 0800. That's right, that's 8 a.m.” (Apostles, 327.)

On cross-examination, Sweeting said his last previous command had been a Navy tanker, but then admitted that the tanker, like the *Herald*, had been a dead ship towed up the coast, and that he had *never* commanded a ship under power at sea, but “my license was used on three trips over the Columbia River Bar,” whatever that means. (Apostles, 335-6.) He did not say that his license was so used in a gale, or that those trips involved a tug with an unwieldy tow.

It is noteworthy in this connection that the master of the Coast Guard vessel, *Balsam*, which was on the scene

as early as 8 P.M. on the 14th, never suggested to the *Sea Fox* that she head for the Columbia, and his official report No. 13-49, after stating that during November 15 he kept on the starboard quarter of the *Herald*, says this:

“During this period courses were steered by the *Sea Fox* that were best suited to the existing conditions.” (Exh. B to deposition of Lt. Schmitz. Exhibit not printed, but sent up in original form.)

On that state of the entire record, the trial judge properly rejected the fantastic contention of Capt. Sweeting, and accepted the judgment of four experienced tug men and the Coast Guard that the failure to try for the Columbia River bar was not a fault of any kind. We submit the finding cannot be attacked here.

5. The events at Drake's Bay are irrelevant.

Appellant's last charge is that Capt. Sommer was negligent, and that his lack of an ocean-going license somehow becomes material, because he “allowed” a tow wire to break and “allowed” a wire to become tangled on November 7, and then left Drake's Bay without “checking” the towing engine and without repairing the fairlead traveler.

We have already demonstrated that the absence of the fairlead traveler from Drake's Bay onward did not and could not have had anything to do with the events of November 14 and 16. The same thing is true of the loss of two lines on November 7. No damage was then caused to the *Herald*, and no salvage is claimed for the reorganization at Drake's Bay. Those matters are and were so

irrelevant that, very properly, neither party wasted any time on them at the trial.

Appellant's phraseology is hopefully but unhappily chosen. Its statement is that non-ocean-licensed Sommer "allowed" a line to break on November 7. The implication is that this would not have happened if Sommer had held an ocean license, but nothing is said as to just how these two factors represent cause and effect. Throughout its brief, appellant suffers from a sort of King Canute complex in assuming that an ocean license could still the waves and govern the behavior of inanimate towing wires.

It is a fact that on November 7 the tow wire broke in rough weather, and that a second wire became so tangled that it had to be thrown away. A sister-ship of the *Sea Fox* then supplied a full-length *new* wire (Reichel, 159), and its subsequent parting in the gale of the 16th is understandable. The most appellant can argue from the loss of two wires on the 7th, is that, thereafter, the *Sea Fox* had only a 600-foot spare wire aboard, rather than a full 1200-foot one. We have already pointed out, above, that the presence of a full length spare wire could not have prevented the breaking of the line in use on November 16, and that the absence of such a wire did not and could not have had any causal relationship to the events giving rise to salvage services.

As to the failure to repair the fairlead traveler, we have shown above that the traveler was never needed after the 8th, would not have been used between the 8th and 14th had it been operative, and could not have been used after the gear teeth stripped on the 14th.

The last part of appellant's charge is that Capt. Sommer did not "check" the towing engine before leaving Drake's Bay. Just what kind of check should have been made is not suggested, and it is obvious that time and place did not permit tearing down the engine to examine the gears and to have them X-rayed or magnafluxed. Nor had anything happened to strain the engine or to lead anyone to believe that a detailed inspection was needed.

All that had occurred was that a tow-line had parted, as happens occasionally. Appellant offered no expert or other testimony that a detailed inspection and test of the towing engine should then have been made, and it is obvious that nothing less than that would have been of any value. In fact, the towing engine worked satisfactorily for the next six days, some of which were stormy, and broke down early on the 14th because of the extraordinary strains created by very severe weather and the awkward behavior of the high, unwieldy *Herald*.

III.

LIBELANT'S RIGHT TO SALVAGE IS NOT BARRED BY NEGLIGENCE OR BY THE TOWAGE CONTRACT.

Appellant's third specification contains two parts. The first cites cases for the rule that a tug cannot recover salvage when its fault contributes to the peril from which the tow is saved, and refers to the previous charges of negligence against the tug. We have already shown the correctness of the finding that the tug was operated with due care and good seamanship, and that none of the

“faults” argued by appellant was or could have been a contributing factor to the peril from which the *Herald* was saved.

As to the legal effect of the towage contract, appellant stresses what it calls the foreseeability of storms off the Pacific Coast, then argues that a tug can claim salvage only if the situation becomes so hopeless that she would be legally justified in abandoning her tow. Let us take up these contentions one at a time.

The fact that storms are foreseeable along the coast in November is entirely immaterial and irrelevant. There was no storm brewing or predicted when the tug left San Francisco on November 5, nor when the voyage was resumed from Drake’s Bay on the 8th. Appellant makes no charge that the tug was negligent in proceeding on either of those dates. By the time the first warning was received (the 13th), the flotilla was so far up the coast that, as we have shown, no port of refuge was then available.

Hence, we have here no issue of the tug being negligent in starting or proceeding in the face of storm warnings. We do not understand that appellant is trying to argue that it was negligent, per se, to try such a voyage in November. If so, the answer is that appellant and Everett-Pacific wanted the ship moved as soon as possible, and that they *and their underwriters* recognized the possibility of storms and voluntarily took a chance on that.

Appellant also cites cargo damage cases holding that foreseeable rough weather is not a “peril of the sea” which will relieve the carrier from liability. The phrase is virtually a word of art in cargo cases, and the rule in

that type of case is based on the sound reasoning that diligence must be exercised to make a cargo vessel fit to carry her freight safely through the kind of weather that can reasonably be expected. It is a rule applied to *common carriers* and has no application here. A tug is not a common carrier or bailee, and *it is far more difficult for a tug and a dead ship to weather a storm than it is for a powered vessel to carry her cargo safely.*

The crux of appellant's argument on this point as to the effect of the towage contract, however, is its contention that the *Sea Fox* cannot claim salvage unless the circumstances were such that she would have been legally justified in abandoning the *Herald* to its fate after the tow line parted on November 16. In support of its argument, appellant cites cases holding a tug liable for loss or damage to the tow when the tug failed to stand by the tow and do what she could to save it. These cases are: *The Barryton*, 42 F. (2d) 561; *The Seminole*, 279 Fed. 94; *In re Moran*, 120 Fed. 556; *Appeal of Cahill*, 124 Fed. 63; *Alaska Commercial Co. v. Williams*, 128 Fed. 362; *Atkinson v. Scully*, 246 Fed. 463.

We are not dealing with a suit for loss of the *Herald* because of her abandonment by the tug, hence none of the foregoing decisions is in point here. They hold only that a tug is liable for *loss* of the tow if the tug fails to act reasonably to save the tow. They do *not* hold that the tug cannot recover a salvage award if it does stand by and render salvage services. These decisions in suits against the tug are expressly distinguished on that ground in the salvage case of *The City of Portland*, 298 Fed. 27,

30 (5th Cir.), which will be discussed at greater length hereinafter.

The true rule as to when a towing tug's services change from a contractual to a salvage basis is laid down in the leading and oft-cited case of *The Minnehaha*, Lush. 335, 15 Engl. Reprint 444. In that case (decided by the highest English Court—the Privy Council), a sailing vessel, anchored 7 miles offshore, hired the tug *United Kingdom* to tow her into port for a fixed sum, and the tug began to do so. The tow line broke and the ship drifted into a position of danger. Another tug, the *Storm King* (owned by the owner of the *United Kingdom*) came to help, and both tugs pulled in tandem on the ship to hold it against the tide until a third tug arrived, whereupon the three tugs towed her to port.

The lower Courts denied a salvage award to the *United Kingdom* and *Storm King* on the ground that the *United Kingdom* had only done what her contract required, and that her owner could not claim salvage for services of that tug or of the *Storm King*, also owned by him. This was reversed on appeal, and a salvage award was made to the contract tug. The opinion is such a clear and sound exposition that we take the liberty of quoting it rather extensively, as follows:

“When a steam-boat engages to tow a vessel for a certain remuneration from one point to another, she does not warrant that she will be able to do so and will do so under all circumstances and at all hazards; but she does engage that she will use her best endeavors for that purpose, and will bring to the task competent skill, and such a crew, tackle, and equip-

ment as are reasonably to be expected in a vessel of her class.

“She may be prevented from fulfilling her contract by *vis major*, by accidents which were not contemplated and which may render the fulfillment of her contract impossible; and in such case, by the general rule of law, she is relieved from her obligations.

“But she does not become relieved from her obligations because unforeseen difficulties occur in the completion of her task; because the performance of the task is interrupted, or cannot be completed in the mode in which it was originally intended, as by the breaking of the ship’s hawser. *But if, in the discharge of this task, by sudden violence of wind or waves, or other accidents, the ship in tow is placed in danger, and the towing-vessel incurs risks and performs duties which were not within the scope of her original engagement, she is entitled to additional remuneration for additional services if the ship be saved, and may claim as a salvor, instead of being restricted to the sum stipulated to be paid for mere towage.* * * *

“* * * In the cases on this subject, the towage contract is generally spoken of as *superseded by the right to salvage*.

“It is not disputed that these are the rules which are acted upon in the Court of Admiralty, and they appear to their Lordships to be founded in reason and in public policy, and to be not inconsistent with legal principles.

“The tug is relieved from the performance of her contract by the impossibility of performing it, but if the performance of it be possible, but in the course of it the ship in her charge is exposed, by unavoidable accident, to dangers which require from the tug serv-

ices of a different class and bearing a higher rate of payment, it is held to be implied in the contract that she shall be paid at such higher rate.

“To hold, on the one hand, that a tug, having contracted to tow, is bound, whatever happens after the contract, though not in the contemplation of the parties, and at all hazards to herself, to take the ship to her destination; or, on the other, that the moment the performance of the contract is interrupted, or its completion in the mode originally intended becomes impossible, the tug is relieved from all further duty, and at liberty to abandon the ship in her charge to her fate;—would be alike inconsistent with the public interests.

“The rule as it is established guards against both inconveniences, and provides at the same time for the safety of the ship and the just remuneration of the tug. The rule has been long settled; parties enter into towage contracts on the faith of it; and we should be extremely sorry that any doubt should be supposed to exist upon it.”

In other words, it is *not* the law that a tug can claim salvage against her tow only if she would have been justified in abandoning it. The true rule is that the tug must not abandon until the situation is hopeless, but that she can claim salvage if, because of the peril, she renders extraordinary services which, if performed by someone else, would constitute salvage.

In *The Albion*, Lush. 282, 167 Engl. Reprint 121, a tug and tow had to anchor and the tug had to run to port for safety. After the storm subsided, the tug went back to sea, found the ship, and towed her back to port in

moderate weather. The judge allowed a salvage award to the tug both for seeking her tow and for towing her in, saying that he gave the tug "great credit." We suggest appellant might give the *Sea Fox* a little credit here, instead of embarking upon a rather ungrateful criticism of everything the tug did.

That our law coincides with English law is demonstrated by the decision of this Honorable Court in *Kovell v. Portland T. & B. Co.*, 171 F. (2d) 749, in which *The Minnehaha* (supra) was cited and quoted in allowing a salvage award to members of the tug's crew for services performed while the tug was standing by the tow as required by law.

In *The City of Portland*, 298 Fed. 27 (5th Cir.), tugs were towing a ship up the Mississippi River when the ship sprang a leak. The tugs then towed the ship to a shallow flat, beached her, and pumped her out after the leak had been closed. The tugs were never in danger, the weather was not rough, the tow lines did not even break, and the shipowner argued that the tugs were not free to abandon the ship, and therefore could not claim salvage. The Court distinguished, as not in point, cases holding the tug liable for wrongfully abandoning the tow, and held that towage becomes salvage when the tow is in danger, *even though the tug would not be justified in leaving*. *The Minnehaha* is again cited and applied as being sound law.

The case cited by appellant of *The I. C. Potter*, L.R. 3 Adm. & Eccl. Cas. 272, used language which, viewed out of context, seems to indicate that a tug cannot claim salvage from her tow unless the circumstances were such that she would have been justified in abandoning the tow.

However, the facts in that case were that tug and tow encountered heavy weather, and the tug simply kept on towing. The tow line did not part, the tow was never in danger, and only slight risk to the tug was involved. The case is decided by a Court inferior to the Court which decided *The Minnehaha*, and is not authority for denying salvage where, as here, the tow line parts, the tow is in danger, and the tug renders extraordinary services at real peril to herself. In fact, after using the language quoted by appellant, the Court in *The I. C. Potter* went on to *allow* a salvage award to the tug.

It could be argued with reason that the *Sea Fox* would have been justified in leaving the *Herald* on the 16th, since the tug's towing engine was broken and the *Balsam* and *Neptune* were on hand to render aid. We need not thus raise an extra and unnecessary issue, however, because, at the very least, the circumstances after the tow line parted were such that the *Sea Fox's* subsequent services were of a salvage nature and deserve a salvage award under the decisions cited above.

Appellant cites a group of cases where a tug was awarded salvage against its own tow, and purports to find, as a distinguishing feature, that in each of those cases there was a failure of the tow's equipment, or the tug's watertight integrity was breached. There was no such element in the *Kovell* case (*supra*), and in none of the cited cases was the decision based on such an artificial and narrow ground. The true *ratio decidendi* of those cases is this:

Where, for any reason other than the fault of the tug, the tow is in danger, and something over and above ordi-

nary towage is needed, the tug may not abandon, but must do what she can to help. *If she does so, she is entitled to a salvage award.*

At page 28, appellant's opening brief cites *The Marechal Suchet*, XI Asp. (N.S.) 553, where a tug which helped get its tow off a strand was denied salvage. Appellant then quotes two isolated fragments of the opinion to give the impression that salvage was denied because the tug only performed its contractual duty. An intelligent reading of the entire opinion will disclose that the tow stranded while the tow line was intact, and the Court held that this created a presumption of inadequate power or poor handling which the evidence did not overcome. Salvage was therefore denied because the tow's peril had been brought about by the tug's negligence, and that is all the case holds. In fact, it is cited for that rule at page 23 of appellant's opening brief.

IV.

THE AWARD TO THE SEA FOX IS NOT EXCESSIVE.

At pages 32-39, appellant's opening brief argues that the award to the *Sea Fox* is too high, in that the share allotted to the non-government vessels was too high, and the District Court should have made some reduction in the *Sea Fox's* share because of her obligation to her tow. Appellant's discussion assumes that the District Court failed to consider the tug's obligation, when there is no such showing in the record, and is self-contradictory on its face.

To begin with, appellant concedes that the District Court followed the proper rule in first determining the aggregate value of all services rendered by all five vessels, and then apportioning it among them. Appellant then grudgingly concedes that a total award or valuation of \$60,000 was fair and proper. Next, appellant concedes that the distribution as between *Sea Fox* on one hand and the owner of *Hercules* and *Neptune* on the other, was proper.

As between these latter three, the District Court awarded \$24,750 to this appellee and \$20,250 to Puget Sound Tug & Barge Co., owner of the *Hercules* and the *Neptune*, and their crews. Remember that the *Neptune* was totally lost in her valiant attempt to help, and that *Hercules* helped to tow from off the Columbia River to Everett, through some more heavy weather. When appellant concedes that *Sea Fox* should get 55% as against 45% for *Neptune* and *Hercules* combined, appellant admits that the services of the *Sea Fox* were of a very real value.

Also, the concession of \$60,000 as a proper over-all figure is an admission that, as the record shows, the *Herald* was in serious danger and was saved only by extraordinary exertions of the vessels involved. If \$60,000 is a proper award for all five vessels, it is a proper award for the services of the *Sea Fox* and the other four, and any "allowance" for the *Sea Fox's* contractual obligation has already been made. The whole is equal to the sum of its parts. We know of no place in the opinion below, or in the Findings and Conclusions, where the District Court held or intimated that it had failed or refused to take into consideration the contract obligation of the *Sea Fox*.

Nor does the attack on the division of the \$60,000 as between government and private vessels come with convincing force from an appellant who has already paid Puget Sound Tug & Barge Co. the full amount awarded to it below. If appellant is sincere in its contention, it would and should have appealed in the companion case. In effect, appellant claims that all the non-government vessels, together, should get only \$30,000. Since appellant admits that the non-governmental award should go 45% to Puget Sound and 55% to *Sea Fox*, appellant is arguing that *Sea Fox* should get only \$16,500 and Puget Sound only \$13,500. Yet appellant has paid the full award of \$20,250 to Puget Sound as owner of the other two vessels.

Still more colorable and misleading is appellant's comparison (pp. 34-39) of the values and services of the salving vessels. Its discussion entirely omits the vital elements of the *work done* by each vessel and *the risk taken* by each vessel. Also, appellant gratuitously drags in the *Prairie*, giving it an assumed value out of thin air. The *Prairie* is a naval vessel which came along on the 16th, stood by for a few hours, then resumed its course. *It rendered no services of any kind whatever.* To assume a value of \$950,000 for that ship and to add it to the values of the *Winona* and *Balsam* to get a figure of \$2,100,000 for government vessels is a rather questionable tactic, to say the least.

We cheerfully concede that *Winona* and *Balsam* were worth \$1,150,000 as against \$400,000 for the three tugs. Values, however, are of little moment in deciding how a conceded "award" of \$60,000 is to be divided among

the salving vessels. As among them, the crucial elements are these:

1. What did each one *do*?
2. How much *risk* did each incur?
3. What, if any, *damage* did each incur?
4. How effective and *material* were each vessel's services?

At pages 36 to 39, appellant's opening brief sets forth a chronological history, in two columns, contrasting the efforts of the *Sea Fox* with those of the *Balsam* and *Winona*. Appellant manages to use a lot more words to describe the actions of the government vessels than for the *Sea Fox*, so that the columnar tabulation *looks* as if the Coast Guard did more than the tug. The *facts*, however, are weighted the other way.

More importantly, however, a contrast between the *Sea Fox* and the two Coast Guard vessels is meaningless. The comparison to be made is between *all three* private tugs on the one hand, and the two government vessels on the other hand. This is true for these reasons:

1. Judge Roche found the services of all five vessels to be worth \$60,000. Appellant did not attack this finding by a specification of error, and has *conceded*, in its opening brief, that *this over-all figure is reasonable*.

2. Judge Roche then allocated one-fourth of this figure, or \$15,000, to the services of the Coast Guard vessels, and the remaining \$45,000 to the three privately owned tugs, *Sea Fox*, *Neptune* and *Hercules* (the latter two being owned by the same firm, Puget Sound Tug and Barge Co.).

3. The amount awarded for the three tugs was subdivided 55% to *Sea Fox* and 45% to the owner of the other two tugs. Appellant filed no specification of error attacking *this* allocation and *concedes that it was proper*.

Since \$60,000 for the five vessels is concededly fair, and since it is conceded that the libelant should receive 55% of that portion of the \$60,000 which is allotted to the non-governmental vessels, appellant's attack is limited by its assignments of error to the allocation of the \$60,000 between governmental vessels and non-governmental vessels as two *groups*. In algebraic language, appellant has conceded that x (private vessels) plus y (government vessels) equals \$60,000, and that libelant is entitled to receive 55% of the x figure. In determining the values of x and y , then, appellant cannot compare 55% of x to all of y , but must compare *all* of x (i.e., the combined services of the three tugs) with y (the services of the two Coast Guard vessels).

Appellant's columnar comparison of *Sea Fox's* performance with that of *Winona* and *Balsam*, therefore, is incomplete and misleading. The only issue which appellant is entitled to discuss is this: was the share allotted to the two Coast Guard vessels too low as against the share allotted to the *three* private tugs *as a group*.

Instead of spreading out a chronological history of what was done by *some* of the five vessels, let us take each of the five vessels, one at a time, and summarize what each one did. Then, let us compare the services of *Winona* and *Balsam*, as a group, with those of the three private tugs, *as a group*.

1. The *Winona* arrived on the scene at 0428 on November 17 and stood by. From 10 to 12 A. M. on the 17th she passed one end of her manila line to the *Herald* and the other to the *Sea Fox*. She did so in relatively moderate weather, by use of a line-throwing gun. (Eastman, Suppl. Apostles, 392-4.) She incurred no peril to herself whatever. She stood by until 0310 the next day, November 18, and then left, having stood by for 23 hours all told. She furnished a manila tow line, but did nothing else.

2. The *Balsam* arrived on the scene at 2140 (9:40 P. M.) on November 14 and stood by, doing nothing, until the *Neptune* was holed at 9 A. M. on the 16th, whereupon the *Balsam* took off the *Neptune's* crew. That afternoon she got a small manila line to the *Herald*, but the line broke almost immediately. The *Balsam* left on the 17th to take the *Neptune* survivors into port, and returned that same day. After the *Hercules* and *Sea Fox* were both hooked up to the *Herald* and it was found that the latter could not drop her anchor, *Balsam* loaned her a cutting torch with which the *Herald's* crew cut the chain.

In summary, the *Balsam* stood by for about 27 hours before the tow line parted, and for three days thereafter. Her actual services consisted of an unsuccessful attempt to tow, and loaning her torch to cut the *Herald's* anchor chain after *Sea Fox* and *Hercules* were ready to tow. The *Balsam* also took off the crew of the *Neptune* after it had been holed. This was a very meritorious service, but was rendered to the *Neptune* and her crew, not to the *Herald*. At no time did the *Balsam* incur any risk to herself or her crew.

3. The *Sea Fox* stood by, after the breaking of the tow line at 0040 on November 16, and tracked the drifting *Herald* throughout a very stormy night. When *Neptune* sank, she stood by the *Neptune* on orders from the Coast Guard. She then again tracked and located the *Herald*. After *Winona* had passed her line to *Herald* and *Sea Fox*, the latter headed into the seas and kept a strain on the line to prevent the *Herald* from dragging her only available anchor. This operation continued from the morning of the 17th to the morning of the 18th, when the *Hercules* got a line onto the *Herald* and the two tugs began to tow the ship to Puget Sound.

Thus *Sea Fox* pulled on the manila line for almost 24 hours to ease the strain on *Herald's* anchor chain, at a time when there was danger of the ship dragging toward shore. That it would have been very risky for the *Herald* simply to lie to one anchor was stated by all the witnesses. (Reichel, 145; Flagstad, 259; Sommers, 242 and 244.) The *Herald's* engineer, Belford, testified as follows:

“Q. What was the weather as you were at anchor?

A. She was blowing pretty good.” (Apostles, 308.)

and again:

“Q. I think I asked you this before, did you fear that you were going to drift ashore when you were at anchor?

A. Yes.” (Apostles, 319.)

The Coast Guard testimony likewise recognizes that the *Herald* would have been in great danger of dragging her one anchor had not the *Sea Fox* kept a strain on the manila line on the 17th and 18th. The Commanding Officer

of the *Balsam* evidently thought so, because his report to the Coast Guard, which brought the *Winona* to the scene, "stated that the position of the *Herald of the Morning* was such that she might drag anchor". (Eastman, Suppl. Apostles, 399.)

Capt. Eastman of the *Winona* went on to testify that when he arrived at the scene he was surprised to find the situation as good as it was, but his testimony shows that, at that time, he mistakenly thought the *Herald* had two anchors down. (Suppl. Apostles, 401.) That Eastman considered only *one* anchor *unsafe* clearly appears from his deposition, as follows:

"Q. Would you be positive in your recollection that there were two anchors down—actually down, that is?

A. Yes, I would, because of this: When we passed the hawser to the *Herald of the Morning*, they had two anchors down and I tried to get the message to them by voice that they were to leave their anchors down until the *Sea Fox* actually had the cable or the hawser fast on board, but while we were passing the hawser to the *Sea Fox* the *Herald of the Morning* let go one of their anchor chains so that it ran out through the hawse pipe, and I distinctly remember that because it caused me considerable alarm that the *Herald of the Morning* might drift, and in the conditions prevailing it would have been a very embarrassing situation, since the *Sea Fox* did not have the hawser secured at that time." (Suppl. Apostles, 401-2.)

Thus all witnesses agreed that the *Sea Fox* rendered a valuable service by holding the *Herald* on the 17th and

18th, since the *Herald* otherwise might well have dragged anchor and gone ashore. Capt. Sweeting of the *Herald* admitted that, "when we got the line, we were perfectly safe when we had the line from the *Sea Fox* * * * *I had worried up to that time*, but then when I had the *Sea Fox's* towing line, I had nothing to worry about. I was free from all worry." (Apostles, 334.)

Next, after holding the *Herald* for 24 hours, the *Sea Fox* got into irons when the *Hercules* passed her line to the *Herald* on the 18th, due to the fact that the *Herald* could not let go her one anchor chain. This caused both *Sea Fox* and *Hercules* to be carried around to where they were headed in the opposite direction to the *Herald*, side-by-side, with considerable danger of collision and with no power to maneuver, due to wind, seas, and the towing lines. (Reichel, 139-141; Flagstad, 257; Craig, 268-9.)

(When a tug, hampered by tow line, weather and/or the position of the tow, gets into a predicament where she will not answer her helm or maneuver readily, as sometimes happens, she is said to be "in irons".)

After the *Herald's* anchor chain was finally cut, the *Sea Fox* and *Hercules* then towed her on up to Puget Sound and into Everett, arriving there at 9:30 P. M. on the 19th. During this trip the weather grew worse on the 18th and was very severe for part of the time. Capt. Flagstad of the *Hercules* (Apostles, 258-9), mate Reichel of the *Sea Fox* (Apostles, 144-5) and mate Craig of the *Hercules* (Apostles, 267-8) testified that the weather again grew very rough on the 18th and they had to reduce speed.

The log of the *Herald* showed force 7 wind ("moderate gale") from 8 to 12 P. M. on the 18th. (Apostles, 333-4.) The log of the *Balsam*, which had more accurate means of measuring wind forces, shows for the 18th force 6 at 4 P. M., increasing to force 9 ("strong gale") from 9 to 12 P. M., with sea condition 4. (Exhibit to Schmitz deposition—sent up in original form but not printed in Apostles.)

4. The *Neptune* got the *Sea Fox's* distress message on the afternoon of the 14th and left at 4:15 P. M. for the scene, arriving there at 9 P. M. on the 15th. (Sprague, 196.) That night she tried, without success, to get a line to the *Herald*, and the next day she was sunk while valiantly trying to help the drifting *Herald* after the latter had broken loose during the night.

5. The *Hercules* left Seattle at 1:30 A. M. on the 17th, arrived off Grays Harbor at 11:30 P. M., and finally found the *Herald* some 10 to 12 miles offshore at 3 A. M. on the 18th. (Flagstad, 254-5.) She stood by until daylight, then got a line onto the ship at about 8 or 8:30 A. M. This was a rather difficult operation, due to the interference of the *Herald's* anchor chain and the manila line to the *Sea Fox*. (Sprague, 256-7; Craig, 269.)

As mate Craig of the *Hercules* testified:

"Our men at times during the operation of getting our tow line aboard, were working in water which had come over the stern of the boat. One man was nearly washed overboard." (Apostles, 267.)

And again:

"Q. Did you take any green water aboard while you were maneuvering, putting your line aboard?

A. We did on the weather side or port side of the vessel; we took green water aboard." (Apostles, 273.)

After her line was fastened to the *Herald*, the *Hercules* got into irons with the *Sea Fox*, as described above, and was subjected to the same peril. The trip from there to Everett was just as difficult for *Hercules* as for *Sea Fox*, as detailed above, and ended at 9:15 P. M. on the 19th.

To summarize, then:

1. The two government vessels spent a total of five and one-half days (*Winona* 1 day, *Balsam* 4½). The *Winona* loaned a hawser to the *Sea Fox* and put the other end onto the *Herald*. The *Balsam* loaned her cutting torch to cut the *Herald's* anchor chain on the 18th, and suggested that the *Herald* anchor at the 30-fathom curve on the 16th. No other services were rendered to the *Herald* by these vessels. Neither of them incurred danger or sustained damage.

2. The three tugs spent a total of 8 days (*Neptune*, 1½ days; *Hercules*, 3 days; *Sea Fox*, 3½ days). They all incurred a real peril to themselves, and the *Neptune* was sunk as a result of her efforts to help. The *Sea Fox* pulled on the manila line for 24 hours to keep the *Herald* from dragging anchor on the 17th-18th, and the *Sea Fox* and *Hercules* spent a day and a half towing the *Herald* to safety through more heavy weather when the *Herald* had no anchor left and would have been helpless had she again broken adrift.

It thus appears from the facts that the government vessels' services consisted chiefly of standing by, loaning two pieces of equipment, and giving one piece of advice, with no danger to themselves and no damage. The three

tugs did *all* the work, incurred considerable *peril*, and sustained a total loss of a tug worth \$150,000 and the death of a member of the *Neptune's* crew.

Appellant's dramatic argument that without the *Winnona's* hawser the *Sea Fox* could have done nothing overlooks the obvious fact that the hawser could do nothing without a boat. The man who lends his hammer to the carpenter renders a useful service, but the carpenter who uses the hammer to build a house makes the major contribution to the final result.

When all the relevant factors are fairly taken into consideration, we submit that the trial Court's allowance to the three tugs of three-fourths of the \$60,000 for salvage services was entirely proper and within the bounds of judicial discretion which should not lightly be set aside here. This Honorable Court has properly pointed out in the case of *Joncich v. Xitco*, 172 F. (2d) 1003, that:

a. A salvage award represents both compensation for services and a reward in the nature of a bounty to encourage salvage efforts.

b. The trial Court, therefore, necessarily has a wide discretion in fixing the amount which is awarded as salvage, and is not to be overruled unless clearly in error.

CONCLUSION.

In reviewing this case, it should be kept in mind that all of the witnesses except the two Coast Guard men testified in open Court. After Judge Roche had thus had a chance to observe the witnesses and make an estimate of their credibility, the record was written up and the

case was submitted on written briefs. With all of these aids, Judge Roche then rendered a written opinion (Apostles, 38-54) which reviews the facts exhaustively and accurately, discusses the law very logically, and comes to a reasoned conclusion that the three tugs ought to get \$45,000 all told, of which libelant should receive 55% for the *Sea Fox* and her crew.

That opinion by the District Court is a very able and well reasoned analysis of the facts and the law. We submit that it is in full accord with the weight of the evidence in the record, and that appellant has failed to demonstrate the "clear error" therein which this Court has repeatedly said must be shown to warrant a reversal. A salvage award cannot be measured in dollars and cents as accurately as a repair bill in a collision case, but must be left to the discretion of the trial Court.

That Judge Roche exercised his discretion wisely and reasonably, and that his decision should be affirmed as sound in fact and law, is

Respectfully submitted,

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Dated, San Francisco, California,

February 27, 1952.

No. 13,135

IN THE

United States Court of Appeals
For the Ninth Circuit

WATERMAN STEAMSHIP CORPORATION,
a corporation,
Appellant,
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SHIPOWNERS & MERCHANTS TOWBOAT
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SEA FOX, INC., a corporation, on
their own behalf and on behalf of
the Master, Officers and Crew of the
Tug Sea Fox,
Appellees.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

PRELIMINARY STATEMENT.

Appellant's closing brief replies to the arguments advanced in appellee's brief in the same order in which the respective subjects are discussed in appellee's brief. Appellant's position was fully and fairly stated in its opening brief. With full realization of the gravity of its comment, appellant must state that this reply brief is made necessary solely by those misleading statements in appellee's brief which exceed the bounds of fair argument.

ARGUMENT.

I. THE TOWAGE ARRANGEMENTS DID NOT FREE THE TUG OR ITS OWNERS FROM RESPONSIBILITY FOR THEIR FAULT.

1. The negligence clause in the towage contract was void.

Appellee continues to urge that the exemption from liability for negligence clause, appearing in the towage contract, is valid, and in support of its contention cites two cases which do not involve the relation of tug and tow (*New Haven Trap Rock Co. v. U. S.*, 15 Fed. Supp. 619 and *Berwind-White Co. v. U. S.*, 15 Fed. (2d) 366) and asserts a possible ambiguity in the language used by the Supreme Court in holding such a clause ineffective in *The Wash Gray*, 277 U.S. 66, 72 L.Ed. 787. The appellee apparently obtains solace from the fact that the Supreme Court, six years before its decision in *The Wash Gray*, supra, found it unnecessary to consider the legal effectiveness of such a clause in its decision in *British Columbia Mills v. Mylroie*, 259 U.S. 1, 66 L.Ed. 807.

Authorities generally consider that the decision of the Supreme Court in *The Wash Gray*, supra, settles the law that such clauses are not valid (*Robinson on Admiralty*, p. 672).

Appellee wholly ignores that the law in this Circuit is clearly settled that such clauses are invalid as between tug and tow. *Mylroie v. British Columbia Mills*, 268 Fed. 449 (9th Cir.), *Sacramento v. Salz*, 3 F. (2d) 759 (9th Cir.).

In all events, appellee wholly ignores the fact that one of the primary items of fault which appellant Waterman charges against appellee shipowners and

the tug SEA FOX was the statutory fault of appellee in furnishing an incompetently manned tug with an unqualified and incompetent master. Such faults, as well as the faults in navigation and management charged by appellant and which are reasonably related thereto, constitute unseaworthiness within the owner's privity and knowledge and in the performance of a personal contract of the appellee tug owner, as to which no such purported exoneration from liability for negligence could, under any circumstances, be valid.

British Columbia Mills v. Mylroie, supra.

2. **Appellant Waterman's insurance arrangements were not made in privity with appellee, were not disclosed to appellee and have no bearing on any proper issue in the case.**

Appellee discusses the insurance arrangements made by Waterman on pages 4 through 12 of appellee's brief.

It is possible that the insurance arrangements made on the vessel by Waterman for appellant Waterman's own benefit were a factor which might properly be considered by the trial Court with regard to the issue of valuation of the HERALD OF THE MORNING. The valuation of the HERALD is not in issue on this appeal. The repeated references which appellee Ship-owners makes to the insurance carried by Waterman on the HERALD are no more proper in this appeal than they would be in a personal injury action. Particularly objectionable is the comment appearing on page 10 of appellee's brief "Thus appellant's explanation * * * is an admission that underwriters, not

Waterman, are defending this case and will have to pay the salvage award to libelant''.

We regret that appellee's tactics make it necessary to mention that Waterman's underwriters are not a party to this proceeding and we are confident this Court will realize that if we were as uninhibited as appellee in our references to insurance, we could and would advance arguments which would carry equally specious conviction against the propriety of allowing any salvage award to the owner of the tug and similarly for all other issues in this appeal.

We frankly admit that if Waterman had made *any* representation or undertaking vis-a-vis appellee Shipowners with respect to securing insurance for Shipowners, an inquiry into the nature of the insurance arrangements Waterman had in fact made might possibly be proper as an inquiry into possible corroboratory evidentiary matter. In this case there were no dealings whatsoever between Waterman and appellee Shipowners with respect to insurance and as a matter of fact, no claim is made by appellee Shipowners that it had any dealings with Waterman respecting insurance. *There is no claim by appellee Shipowners that Waterman made any agreement with it concerning insurance.*

The insurance on the HERALD, if any, is a private contract between Waterman and its underwriters in which appellee Shipowners does not have even a proper academic interest. Butler v. Boston S. S. Co., 130 U.S. 527, 32 L.Ed. 1017. It is regrettable that

the nature of appellee's presentation makes necessary the repetition of such elementary principles.

It is also regrettable that the nature of appellee's presentation makes necessary the repetitious statement that the insurance arrangements on the HERALD were between Waterman and Waterman's underwriters and for Waterman's benefit. Such arrangements were not between Waterman's underwriters and appellee Shipowners. They were not between Waterman and appellee Shipowners. They were not for the benefit of appellee Shipowners.

Appellee Shipowners makes much of the fact that the policy on the HERALD was endorsed with a rider which called for an additional one-eighth of one per cent premium and carried the notation "towing tug and/or tugs released of liability". The intended effect of such a clause was that Waterman's interest should be protected even if the arrangements made by Everett-Pacific with appellee Shipowners should result in the release of the tug from liability. The inclusion of such a rider in the policy did not under any possible construction or interpretation constitute a "to whom it may concern" warranty by Waterman that it would not look to appellee Shipowners for recourse for damages suffered by reason of Shipowners' negligence.

It is conceivably possible that the contracting parties in the towage agreement (Everett Pacific and appellee Shipowners) might have made arrangements which would have effectively relieved Shipowners from liability for some forms of negligence for ex-

ample, expressly naming Shipowners as an assured in the policy. The arrangements which were in fact made did not have that effect. The fact that Waterman had a clause added to Waterman's insurance cannot avail appellee Shipowners.

In an insurance policy, a waiver of a warranty of seaworthiness is not an admission of unseaworthiness as to third parties and likewise in a policy of insurance an agreement between the parties to the contract of insurance that it shall be valid even if a tug shall be released from liability for its negligence is, as to the third party tug, no admission of such release from liability and cannot under any conceivable theory estop the assured from asserting the absence of any such release.

On pages 7, 8 and 11 of its brief, appellee has referred to a waiver of subrogation in the policy between Waterman and Waterman's underwriters. We repeat that Waterman is the sole party in this case and that this is not a subrogation case. Such statements are wholly without support in the record. We particularly refer to the comment on page 11 of appellee's brief that the "insurers * * * waived subrogation in writing on the policy". This statement, if not a plain untruth, grossly exceeds the bounds of fair argument.

We unfortunately also find it necessary to mention the misleading nature of the penultimate paragraph appearing on page five of appellee's brief. This paragraph, as appears from its reference, is based on a telegram sent by Sudden & Christenson to Everett

Pacific and appearing on page 284 of the Apostles on Appeal. Appellee's phrasing would make it appear (1) that Sudden & Christenson did the acts therein mentioned in its capacity as agent for Waterman and (2) was directly prompted to do such acts at the instance of Waterman and (3) that the representations therein as to the "standard form towage contract" were representations of the belief of Waterman, all of which connotations and inferences are wholly without support in the record.

The italicized portion of the following statement appearing on pages 10 and 11 of appellee's brief is wholly without support in the record (cf. p. 284, Apostles on Appeal): "2. Waterman requested copies of the towing contract, so that it could arrange for insurance, *stating that it was understood the standard towing contract provided for release of tug*".

Particularly in view of our belief that this entire discussion of the insurance arrangements is wholly irrelevant in the case, we regret the rather extended discussion that has been made necessary. Other portions of this section of appellee's brief are misleading and not supported by the record, in particular the italicized portion of paragraph numbered 3 appearing on page 8 of appellee's brief and paragraph numbered (a) appearing on page 11 of appellee's brief (cf. p. 384 Apostles on Appeal).

II. THE STATUTORY FAULT OF RESPONDENT AND THE TUG SEA FOX AND THE NEGLIGENCE OF THE TUG SEA FOX.

1. R. T. Sommer was not licensed as required by statute and there is no evidence that he was in fact qualified.

The corresponding portion of appellee's brief is a masterpiece of obfuscation, feint and diversionary maneuver.

On pages 12 through 17 of its brief, appellee in a vigorous blunderbuss defense, asserts (1) that the SEA FOX did not require a licensed master since it was a seagoing *motor* vessel of less than 300 gross tons, (2) that if the SEA FOX did require a master possessing a certificate of competency under the requirements of The Conventions for Minimum Professional Requirements then the master's license which Captain Sommer held for San Francisco Bay satisfied the requirements, and (3) that in any event in obtaining his limited inland license, Mr. Sommer had been required to prove to the Coast Guard compliance with all requirements and qualifications required for the master's offshore certificate of competence under the Convention with the exception of proving competence in celestial navigation. It is apparently appellee Shipowners' endeavor to lead this Court to believe that the statutory fault of appellee and of Mr. Sommer was *de minimis* and of so technical and unsubstantial a nature as to be disregarded. The manner of appellee's presentation makes necessary a more detailed analysis of this portion of its brief than the merit of its argument justifies.

On page 12 of its brief, appellee states:

"Section 224(a) of 46 U.S. Code, subsec. 3, provides that *any* license issued to a master *shall be*

deemed a certificate of competency within the requirement of the convention."

This is a misstatement of the substance of the statutory provision. 46 U. S. Code, 224a (3) in fact provides:

"(3) Any license issued (whether before, or on, or after, October 29, 1939) to a master, mate, chief engineer, or assistant engineer *of a vessel to which this section applies* shall be deemed to be a certificate of competency for a master or skipper, navigating officer in charge of a watch, chief engineer, or engineer in charge of a watch, respectively," (emphasis supplied).

The section in question, 46 U.S.C.A. 224a, applies to vessels "navigating on the high seas" as appears from 46 U.S.C.A. 224a (1) with certain specified exemptions which are not here relevant, such as ships of war, government vessels, dhows and junks. A license issued to Mr. Sommer to act as master on a ship navigating San Francisco Bay and tributaries is by no stretch of the imagination a license issued Mr. Sommer for navigating a vessel on the high seas. The apparent and sole purpose of the provisions of 46 U.S.C.A. 224a (3) is to make it clear that for all purposes under the Convention an unlimited (high seas) license issued by the Coast Guard should serve as a certificate of competency under the Convention. This subsection makes it unnecessary for a qualified mariner holding an unlimited license to carry a separate piece of paper specially designated a "certificate of competence". It does not excuse a person holding an *inland waters* license from the necessity

of securing a certificate of competency before navigating on the *high seas*.

The SEA FOX is a motor vessel of 282 gross tons and as such is an "uninspected vessel" for the purposes of the U. S. Coast Guard Inspection Laws and Regulations. This is freely admitted.

Appellee, however, quotes a *portion* of that Coast Guard Regulation (46 C.F.R. 62.19) (Appellee's Brief p. 13) which affirmatively states the requirement that "inspected vessels" be manned by licensed officers. The substance of appellee's argument is that the SEA FOX was an "uninspected vessel" *ergo* the licensing requirements for inspected vessels do not apply to it *ergo* appellee and the SEA FOX might properly ignore any laws, treaties or regulations pertaining to "uninspected vessels".

At the time in question the SEA FOX was admittedly a vessel of more than 200 gross tons navigating on the high seas. As such it was clearly subject to the Convention (1938 A.M.C. 1284) and the enabling and penal statute 46 U.S.C. 224a. The Coast Guard regulations expressly extend all statutes relating to the licensing of officers for "inspected vessels" to "uninspected vessels" subject to the Convention. The regulation which so extends the statutory provisions is 46 C.F.R. 10.15-1.

Appellee argues that even if the failure of Mr. Sommer to have a proper license was a statutory fault still the fault was unsubstantial and purely technical since (1) Mr. Reichel, the mate of the SEA FOX held a master's license and since (2) in any

event to have secured his San Francisco Bay license Mr. Sommer had proved to the Coast Guard that he had all of the qualifications necessary for a high seas license save competence in celestial navigation.

Appellee's first point is wholly without merit. Mr. Sommer was the master of the SEA FOX and acted as such throughout the voyage in question. It was Mr. Sommer's judgment and Mr. Sommer's orders that controlled the conduct of the SEA FOX.

It also must be noted that the SEA FOX carried only three deck officers including Mr. Sommer and it was necessary for each of them to stand a watch, and each of the three including Mr. Sommer in fact stood a watch (Apostles p. 298). Thus the SEA FOX was not only without a properly qualified master but for eight hours out of every 24 the deck officer on watch was unqualified and acting in violation of the Convention and of 46 U.S.C. 224a.

With regard to its second point appellee states "Thus the only thing which can be said of Capt. Sommer's lack of an offshore license is that he had never passed an examination on celestial navigation." (Appellee's Brief p. 15.) This is a bald misstatement.

On page 14 of its brief appellee has listed the subjects required for the examination which Mr. Sommer passed in obtaining his San Francisco Bay license. The subjects upon which he would be examined for a master's competency certificate for an uninspected vessel under the Convention are listed in 46 C.F.R. 10.15-31. Entirely disregarding items

related to navigation, among the subjects specifically mentioned as required for the high seas certificate which are not specifically mentioned as required for the inland license are:

Meteorology, use and reading of weather bulletins;

Keeping a ship's head to sea in heavy weather with engines broken down;

How to rig a jury rudder;

Action to be taken in the event of springing a leak;

Cast of lead in heavy weather.

In addition the candidate for a master's certificate under the Convention must have served at least one year as a licensed mate (46 C.F.R. 10.15-29) which presupposes that the candidate has demonstrated proficiency in the following subjects (46 C.F.R. 10.15-31) upon which Mr. Sommer need never have been examined to secure his San Francisco Bay license (cf. 46 C.F.R. 10.05-15, 59):

The use and construction of a sea anchor;

The use and reading of the aneroid barometer;

Handling of a vessel's boat in heavy weather;

Distress signals and use of line throwing apparatus.

It is quite possible and even likely that the absence of that knowledge and skill which Mr. Sommer would have been required to have to enable him to obtain a license under the Convention, but which he did not

require for his San Francisco Bay license contributed to the hazard of the HERALD. Possibly of particular significance is the requirement that for a license under the Convention a master be able to understand weather bulletins including those phrased in semi-technical language such as warned of the approaching storm which are set forth on pages 18 and 19 of appellant's opening brief.

Of great interest is the difference in the experience required for a master's license under the Convention and a master's license for San Francisco Bay.

For a master's license for San Francisco Bay (46 C.F.R. 10.05-15) it was necessary that Mr. Sommer have experience on vessels on "bays, sounds, and lakes other than the Great Lakes".

For a master's license under the Convention (46 C.F.R. 10.15-29) it would have been necessary that Mr. Sommer have served 4 years *at sea* of which 1 year must have been as a licensed mate, or equivalent.

With regard to his actual experience Mr. Sommer testified in response to questions by the Court (Apostles pp. 231-232):

"Q. What is your business or occupation?

A. Captain of a tug, the tug Sea Fox.

Q. How long have you been on the Sea Fox?

A. About six years.

Q. And where? Did you have any regular run?

A. No, just towing around the Bay."

To round out the summary of Mr. Sommer's experience it is necessary only to refer to Appendix C to

appellant's opening brief to note the quiet times of the year in which Mr. Sommer acquired the "sea" experience which appellee argues fully qualified him to serve as a master for a voyage on the high seas in the stormy month of November.

2. The negligence of appellee and of the tug **SEA FOX**.

In its discussion of the rule of *The Pennsylvania*, 86 U.S. 125, 22 L.Ed. 148 at pages 17-18 of its brief appellee states that the rule comes into play only after negligence has been proved. If appellee were correct in this view the rule would be utterly meaningless. The Pennsylvania rule comes into play immediately the statutory fault or violation is shown. The violation of statute is in itself negligence and once the statutory violation is proved the only question remaining is whether the particular statutory violation *could* have been a contributing cause to the casualty.

In the present case it would of course be impossible for appellant to prove that the HERALD would not have encountered difficulty if the SEA FOX had had a legally qualified master just as in the *Denali*, 112 F. (2d) 952 it would have been impossible for the damage claimants to have proved that the vessel would not have stranded if the vessel had observed the Watches at Sea Act. It is seldom possible to prove a negative. Such is in the essence of the reason for the rule and the reason for the application of the rule is peculiarly appropriate in this case.

The HERALD was a dead ship completely in the charge of and under the control of the SEA FOX.

Acts in the management of the towing gear were performed aboard the SEA FOX by its crew all of whom are libelants in the present case. The master of the SEA FOX did not have those qualifications which the law required of him, and of appellee as a minimum. As a consequence the SEA FOX was unseaworthy in its most important single aspect. The same failure was flagrant negligence on the part of appellee. In the nature of the case and the voyage and as the record reveals and our opening brief points out the appellee is wholly unable to prove that the lack of qualifications of the master could not have contributed to the peril of the HERALD.

The specific instances which we have mentioned, e.g. the SEA FOX'S failure to replace her "insurance wire", her failure to repair her towing engine, her inexcusable and unexplained delay in calling for assistance after storm warnings and after the breakdown of her towing engine, etc., are each items of negligence and fault requiring that salvage be denied to the SEA FOX and that appellant receive judgment on its cross-libel.

In addition each of such instances of negligence represent situations in which a properly qualified and prudent tug master appreciating the probability of heavy weather would have made a different decision better designed to protect the HERALD. In other words each of such specific items of negligence represents an affirmative showing by appellant Waterman that the lack of a qualified master did in fact contribute to the HERALD'S peril.

Under the law, however, it is appellee's burden to prove that no such situations arose or existed. There may be other similar situations which arose and of which, because of the nature of the operation, appellant Waterman is unaware and it is appellee's burden to have proved, which it has not, that there were no such other situations. Appellant Waterman has proved statutory fault and in addition has proved affirmatively several specific items of negligence. On the record appellant Waterman has proved far more than it was necessary for it to prove to require a judgment in its favor both on appellee's salvage claim and on Waterman's cross-libel.

We have in appellant's opening brief fully shown that the specific items of negligence were both negligent and contributorily related to the peril of the HERALD. We therefore reply with great brevity.

a. The lack of an insurance wire.

It clearly appears from libelant's own testimony that the short 600 foot spare cable that the SEA FOX carried would not have been usable or satisfactory for assisting the HERALD in any of the conditions that prevailed. Mr. Reichel, the mate of the SEA FOX testified (Apostles pp. 154-155) that normally a 1200-foot towing wire was used, that approximately 200 feet of this length was required to secure the wire to the towing drum, that 1000 feet was used over the stern of the tug to the tow and that if a shorter wire were used there would be danger of it breaking. In the conditions that prevailed when the SEA FOX had an opportunity to

give the HERALD another wire after the SEA FOX'S towing engine broke it probably would have been necessary to secure the wire to the HERALD'S bitts rather than her anchor chain thus further shortening the length of wire effectively available. It is clear from the record that a 1200-foot spare wire could and should have been used but that the 600-foot "spare" was useful only as ballast for the SEA FOX.

Appellees seek to avoid the consequences of their failure to provide a proper spare towing wire by claiming that it would have added nothing since the NEPTUNE was on the scene before the SEA FOX towing wire broke.

The critical period, however, commences with the weather report of 0830 the morning of November 13th (Appellant's Opening Brief p. 19) and not later than midnight of November 13th by which time the towing engine of the SEA FOX was out of commission. The SEA FOX, however, did nothing to protect the HERALD until late in the afternoon of the following day when it radioed for assistance. The towing engine of the SEA FOX broke on November 13th but the towing wire did not break until November 16th. During this period of more than two days the weather afforded opportunities for the SEA FOX to have given the HERALD an additional wire if she had had one—and prior to the arrival of the NEPTUNE.

b. The delay in calling for help.

The period from 0830 on November 13th when notice of impending heavy weather was given until 1620 on November 14th when the SEA FOX radioed for help and during which the SEA FOX did nothing to secure the safety of the HERALD is pertinent not only with regard to the lack of a proper spare towing cable but also in respect to the delay in securing help and the failure to seek a port of refuge. A qualified master with sea experience would have sought assistance as soon as there was a forecast of weather that his immediately previous experience had taught him was beyond the capacity of his vessel. With timely assistance called for in time it is probable that the HERALD could have reached a port of refuge and have avoided the peril which gave rise to the judgment for \$20,250.00 plus interest and costs which Waterman was required to pay to the NEPTUNE and HERCULES interests for resulting salvage services as well as the other damage suffered by the HERALD. To prevail appellee must prove the contrary and appellee has no proof to the contrary.

c. The fairlead traveller.

The appellee attempts to excuse the negligence of the SEA FOX in leaving Drake's Bay on November 8th without repairing the fairlead traveller by claiming that the traveller would not have been used after the 8th and could not have been used after the gears stripped on the 14th (13th?). Appellee's argument is based on its demonstration that the fairlead traveller

is used when line is heaved in, not when it is let out. It appears from appellee's own testimony (Apostles p. 192) that the towing winch of the SEA FOX was intended for letting out and heaving in line. On the SEA FOX this had to be done by manually operated controls unlike automatic towing winches which automatically take in or let out line as strain decreases or increases. From the record it may fairly be assumed that a carefully and competently handled tug encountering heavy weather would attempt to minimize the strain on its towing winch and on the towing cable by slacking off wire at moments of greatest strain and then heaving the wire in when the strain decreased, just as would a fisherman in playing anything from a trout to a tarpon. But the SEA FOX had no fairlead traveller. She could not heave in. She required some 200 feet of the wire on her drum to anchor the wire and she did not dare to let the wire out in moments of great strain because every foot of wire that would be let out would be gone beyond recall. The result was a geometrically increased strain on the gears which finally gave way, undoubtedly as a direct result. Appellee has not shown the contrary. Appellee has not shown that a properly qualified master with sea experience would have gone to sea with only half of a towing winch.

III. THE APPELLEE'S CLAIM FOR SALVAGE IS BARRED BY ITS CONTRACT AS WELL AS ITS NEGLIGENCE. CLAIM OF CREW OF SEA FOX AS DISTINGUISHED FROM OWNER AND MASTER.

1. Contract.

Nowhere in its brief does appellee deny that the weather encountered by the HERALD was unforeseeable. Appellee's entire argument is that a tug may claim salvage from its tow if difficulty is encountered because of heavy weather even though the heavy weather was foreseeable. By inference in its brief appellee admits what the record clearly proves, i.e. that the weather encountered by the HERALD on the voyage in question was not unusual for the season and was foreseeable.

Such being the case the appellee can find no case to support its claim that the services performed by the SEA FOX were not covered by the towage contract.

In a recent English case in the Admiralty Division decided December 17, 1951, the *Slaney* (1951), 2 Lloyd's Rep. 538 in which a tug, using the same arguments advanced by appellee herein, claimed salvage because in towing a dead ship the wind increased to gale force and caused considerable difficulty including the stranding of a tow cable. The Court, Lord Merri-man, P., of course denied the claim for salvage saying:

"* * * I am asked nevertheless to consider that this case comes within the proposition stated by the late Mr. Justice Hill in the *Homewood* (1928) 31 Ll. L. Rep. 336 at P. 339 in these words:

“ ‘To constitute a salvage service by a tug under contract to tow two elements are necessary: (1) that the tow is in danger by reason of circumstances which could not reasonably have been contemplated by the parties; and (2) that risks are incurred or duties performed by the tug which could not reasonably be held to be within the scope of the contract.’

“In my opinion, neither the one proposition nor the other is within measurable distance of being satisfied. There was nothing in the deterioration of the weather that was not expected or to be expected at that time of the year, and there was no service or duty performed by the tug which could not reasonably be held to be within the scope of the contract. The very most which was said was that there was damage to one tow-rope which involved the replacement of a certain number of fathoms, and the chafing of another which involved a resplicing.

“In my opinion this case has some of the elements of a ‘try-on’. I think it is a hopeless claim and that there are no elements of salvage present. It is all covered by the contract and I give judgment accordingly.”

Merely to state the rule is to deny appellee's claim.

2. Claim of the crew of the **SEA FOX as distinguished from the owner and master of the **SEA FOX**.**

The appellee Shipowners is barred by its contract from salvage. Appellee Shipowners and the master of the **SEA FOX** are barred from salvage by their statutory fault and other items of negligence. A recent case would indicate that the innocent crew

might not be barred by the contract unless they had knowledge of its terms. The *Ionian Leader*, 100 Fed. Supp. 829. We express no view on this question since the authorities appear to leave the answer in doubt but if this Court should find that the innocent crew of the SEA FOX is not barred from some compensation of a salvage nature for their efforts in extricating the HERALD from the peril in which she had been placed by the negligence of appellee and Mr. Sommer, then that award to the crew must be reimbursed to Waterman by appellee Shipowners. Logically we see no reason that the innocent crew of the SEA FOX should be barred by the negligence and statutory fault of the owner and master of the SEA FOX. Factually, however, we find it difficult in the nature of the transaction to conceive that the crew did not realize that the SEA FOX had contracted to use its best efforts to tow the HERALD to Everett, Washington.

IV. THE AWARD TO THE SEA FOX WAS EXCESSIVE.

In its brief appellee apparently concedes (Appellee's brief p. 43) that any salvage award to which the SEA FOX might otherwise have been entitled (disregarding negligence) should have been reduced by reason of the tug's contractual obligation, but seeks to avoid the necessary effect of the concession by stating "We know of no place in the opinion below, or in the findings and conclusions, where the District Court held or intimated that it had failed or refused to take into consideration the contract obligation of the Sea

Fox.” and “any ‘allowance’ for the Sea Fox’s contractual obligation has already been made.”

We refer briefly to the trial Court’s memorandum opinion:

“In view of all the evidence, therefore, the court estimates that the total salvage should be considered at the sum of \$60,000.00, provided all the salvors who rendered service claimed and were entitled to claim pay for their services.” (Apostles p. 46.)

and further

“Accordingly, the Court holds that the facts in this case warrant allowing the Sea Fox to claim as a salvor. The only remaining question is whether her claim is barred because of fault or negligence.” (Apostles p. 48.)

It is wholly clear from a reading of the memorandum opinion that the Court allowed the SEA FOX to participate without modification or deduction as a meritorious volunteer salvor. The remainder of the matter discussed in this section of appellee’s brief is adequately covered in our opening brief.

The appellee makes much of the fact that Waterman paid to the Puget Sound interests an award which it admittedly considers excessive. Appellee argues from this that appellant does not in fact consider the award to the SEA FOX excessive. Nothing could be further from the fact. Appellant Waterman paid the Puget Sound interests for the account of appellee and is perfecting its claim for reimbursement in this proceeding. The present appellee was im-

pleaded in the *Puget Sound* case and had ample opportunity to defend the claims of the Puget Sound interests.

V. PUBLIC POLICY AND CONCLUSION.

Appellant pointed out in its opening brief that virtually all cases in which a tug has been permitted to claim salvage from its tow are cases in which there had been a failure of the *tow's* equipment. Appellee argues that this is mere happenstance. Nothing could be further from the truth. A tow, particularly a dead ship such as the **HERALD** is at the mercy of her tug and in normal course the owner of the tow has little if any means of knowing what occurs aboard the tug. The cases in their results and holdings, although not expressly stated in the opinions, recognize that no tug should ever receive from the Courts an incentive for negligence or incompetence. A tug should never receive a salvage bounty from her tow unless the facts giving rise to the salvage situation are so clearly divorced from the tug as by their very nature to preclude even the hint of a possibility that the tug is receiving a reward for failing to use her best efforts.

In this case the facts are quite otherwise. Disregarding appellant's other very substantial damages appellee has received a reward of \$24,750 for entrusting the **HERALD** and her sixteen lives to an unsea-

worthy tug with an unqualified master. Nothing more need be said.

Dated, San Francisco, California,

March 10, 1952.

Respectfully submitted,

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Proctors for Appellant.

No. 13136.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MINORU HAMAMOTO,

Appellant,

vs.

DEAN ACHESON, as Secretary of State,

Appellee.

On Appeal From the United States District Court for the
Southern District of California.
Central Division

BRIEF FOR APPELLEE AND APPENDIX.

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FILED

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No. 13136.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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vs.

DEAN ACHESON, as Secretary of State,

Appellee.

**On Appeal From the United States District Court for the
Southern District of California.
Central Division**

BRIEF FOR APPELLEE.

Jurisdiction.

The District Court has jurisdiction of the action under provisions of Section 503 of the Nationality Act of 1940 (8 U. S. C. 903) as alleged in Paragraph III of plaintiff's Complaint [C. T. 2], the necessary factual allegations of "denial of a right or privilege as a national of the United States * * * on the ground that he is not a national * * *" as required by Section 903 being alleged in Paragraphs V and VI of plaintiff's Complaint [C. T. 3]. The denial having been made by the Secretary of State, the defendant, Dean Acheson, as head of that Department, is the necessary and proper defendant as required by said Section 903, *supra*.

This Court has jurisdiction of this appeal under the provisions of 28 U. S. C. 1291 and 1294(1), there being no dispute that the judgment of the District Court was a final judgment.

Statutes Involved.

The denial of citizenship by defendant-appellee was based on the provisions of Sections 401(c), 402 and 403(b) of the Nationality Act of 1940 (8 U. S. C. 801(c), 802 and 803) as follows:

“§801 General means of losing United States Nationality.

A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; * * *.

“§802 Presumption of expatriation.

A national of the United States who was born in the United States * * * shall be presumed to have expatriated himself *under subsection (c) or (d) of Section 801, when he shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state* * * * and such presumption shall exist until overcome whether or not the individual has returned to the

United States. Such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States or to an immigration officer of the United States under such rules and regulations as the Department of State and the Department of Justice jointly prescribe. * * *.

“§803 *Restrictions on expatriation; residence in United States; age.*

(b) No national under 18 years of age can expatriate himself under subsections (b) to (g) of Section 801.” (Emphasis supplied.)

Statement of the Case.

There are two principal questions presented by appellant's brief in this action:

1. Does the evidence support the Findings of Fact [C. T. 13] and Judgment [C. T. 18] of the District Court that appellant's service in the Japanese army was voluntary and not the result of duress and that plaintiff thereby lost his United States citizenship pursuant to the provisions of Section 401(c) of the Nationality Act of 1940 (*supra*)?

The manner in which this question is raised is by appellant's specification of errors 1, 2 and 3 (App. Br. 7).

2. Is Section 401 of the Nationality Act constitutional on its face and was the application thereof to this plaintiff constitutional?

This question was raised by appellant's motion for a new trial [C. T. 12] and in appellant's specification of error No. 3 (App. Br. 7).

SUMMARY OF ARGUMENT.

I.

Constitutionality.

A. SECTION 401 OF THE NATIONALITY ACT OF 1940 IS CONSTITUTIONAL ON ITS FACE.

B. SECTION 401 OF THE NATIONALITY ACT OF 1940 IS CONSTITUTIONAL AS APPLIED.

1. The Burden Is on the Appellant to Prove Duress, and the Evidence Supports the Findings and Conclusions of the Court That There Was No Duress.

2. It Is Not Necessary to Prove That Appellant's Real Attachment Was to a Foreign State in Order for the Court to Find His Military Service Was Voluntary.

3. Subjective Knowledge of the Consequence of Expatriation Which Will Result From Voluntary Service in the Japanese Army Is Not a Prerequisite to Expatriation.

II.

Duress.

A. APPELLANT'S SERVICE IN THE JAPANESE ARMY WAS VOLUNTARY AND NOT THE RESULT OF DURESS, AND THE COURT DID NOT ERR IN SO FINDING.

1. Appellee's Theory of the Case.
2. The Facts.
3. The Law.

ARGUMENT.

I.

CONSTITUTIONALITY.

A. Section 401 of the Nationality Act of 1940 Is Constitutional on Its Face.

Appellant has pointed out (App. Br. 19) that the District Court in Hawaii in the cases of *Okimura v. Acheson*, 99 F. Supp. 587, and *Murata v. Acheson*, 99 F. Supp. 591, held Sections 401(c) and (e) of the Nationality Act to be unconstitutional, and further noted that the Supreme Court did not pass on the constitutional issue but vacated the judgment and remanded the case to the Trial Court, for specific findings as to the circumstances attending appellant's services in the Japanese army and the reasonable inferences to be drawn therefrom (Supreme Court, Journal of Proceedings, 20 Law Week 3167).

However, it is to be noted that the question of constitutionality of Section 401(e) is being raised in the case of *Kuniyuki v. Acheson*, in which a petition for certiorari was filed December 24, 1951, by Messrs. Wirin & Okrand, attorneys for plaintiff in the instant case. The opinion of this Court in the *Kuniyuki* case is reported at 181 F. 2d 741, wherein this Court reversed the judgment of the District Court for plaintiff and held that the evidence does not support the Trial Court's finding that plaintiff voted involuntarily and that the fact that plaintiff did not intend to lose her nationality and did not know that she would lose it if she voted in such elections is immaterial. It would appear that this Court finds constitutional the various provisions in Section 401 of the Nationality Act. In the case of *Dos Reis ex rel. Camara*

v. Nicolls, 161 F. 2d 860, the Supreme Court did not find the provisions of the Nationality Act unconstitutional.

When the question of constitutionality was argued before the District Court in this case on the motion for new trial, the District Court pointed out that Congress can pass an act which is constitutional which is based on the premise that you can draw an inference from the doing of certain acts of an intent to expatriate. It is reasonable to say that the various acts of expatriation listed in Section 401 of the Nationality Act logically give rise to an inference of such an intent to expatriate, in the absence of evidence to the contrary. The argument of the District Court in the *Okimura* case, that if the acts outlined in Section 401 are constitutional, it would also be constitutional for Congress to declare that owning a gun or attending a military parade would expatriate, falls for the reason that there is no logical inference of such intent from such acts.

B. Section 401 of the Nationality Act of 1940 Is Constitutional as Applied.

- 1. The Burden Was on the Appellant to Prove Duress, and the Evidence Supports the Finding and Conclusion of the Court That There Was No Duress.**

The Government's burden of proof under the Nationality Act was sustained when plaintiff admitted service in the Japanese army, as alleged in plaintiff's Complaint [C. T. 2], the plaintiff then having Japanese nationality as required by Section 401(c) and having resided in Japan for more than six months [R. T. 12 and 66] and the presumption of Section 402 of the Nationality Act having come into play.

The burden of going forward with the evidence was then upon plaintiff, to prove that such military service was the result of duress. Plaintiff recognized this burden by the allegations in Paragraph V of the Complaint that his "service in the army * * * was the result of coercion and was not the plaintiff's free and voluntary act." This allegation was denied in defendant's Answer [C. T. 5].

See also, on burden of proof, *Podea v. Marshall*, 83 F. Supp. 216.

2. It Is Not Necessary to Prove That Appellant's Real Attachment Was to a Foreign State in Order for the Court to Find His Military Service Was Voluntary.

As discussed under Part II of this Brief under "Duress," the appellant has sought to break down into various defenses, certain bits of evidence which were offered in the various cases on the issue of duress, such as "attachment to a foreign state," "authentic abandonment of his own nationality," "offering his all in support of a foreign state," "free and intelligent choice." Regardless of the various phrases used by the Courts in the decisions or the variations of the evidence in each case, there is really only one issue tendered in these cases, and that is whether or not the expatriating act was voluntarily done or whether it was the result of duress. In any event, there is evidence in the record from which the Court could infer, as it did, that appellant's attachment was to Japan and that he returned to Japan with the intention of performing his duty of military service.

3. **Subjective Knowledge of the Consequence of Expatriation Which Will Result From Voluntary Service in the Japanese Army Is Not a Prerequisite to Expatriation.**

In *United States v. Savorgnan*, 338 U. S. 491, the Supreme Court held that the test of volition is "objective." See also *Kuniyuki v. Acheson*, 189 F. 2d 741, in which the Court in this Circuit held to the same effect.

II.
DURESS.

A. **Appellant's Service in the Japanese Army Was Voluntary and Not the Result of Duress, and the Court Did Not Err in so Finding.**

1. **Appellee's Theory of the Case.**

Because appellant's statement of the case and argument under appellant's Point II and Specifications of Error Nos. I and III essentially involve the question of the sufficiency of the evidence to sustain the finding of voluntary action by the Court, we here briefly summarize the facts as shown by the evidence.

It is appellee's theory of the case that where a person with full knowledge of a peril voluntarily places himself in a position of peril, when the peril thereafter actually occurs, the Court may draw an inference from such facts that such person did not intend or desire to avoid the peril and his actions were not the result of duress. In other words, the evidence shows that plaintiff with full knowledge of his eligibility for conscription in the Japanese Army, voluntarily returned to Japan at a time when he was eligible for conscription and remained there, knowing that he was subject to the peril of conscription, and as a result he was conscripted. The facts as revealed in the transcript of record, volume II, are as follows:

2. The Facts.

The plaintiff was born at Gardena, California, on December 17, 1917, of parents who were born in Japan [R. T. 6]. Appellant was in Japan three times, the first time being during the years 1924 to 1935 [R. T. 7], during which time, at the age of 16 to 18 years, he went to Japanese schools and received some military training [R. T. 68]. Japan has had a universal military conscription system for many years [Appellant's Ex. 13]. Appellant returned to the United States in 1935 when he was 18 years of age.

Appellant went to Japan for the second time on April 13, 1938 at the age of 21 [R. T. 10]. He knew at that time he was a dual citizen [R. T. 70]—that is a Japanese citizen as well as an American citizen. While in Japan, at this time, and about May of 1938, appellant had a conversation with the man in charge of the draft for Japanese military duty in Esumi, the town where appellant lived, regarding the physical examination for the Japanese Army [R. T. 11], which all males were required to take under the Japanese conscription system after reaching their twentieth birthday [App. Ex. 13]. Appellant then thought he was eligible for conscription in the Japanese Army [R. T. 42], but did not receive a notice to report for physical examination at that time [R. T. 47].

In September, 1938, appellant returned to the United States. He visited the United States Consul at Kobe prior to returning to the United States [R. T. 51] and his return to the United States was not for the purpose of avoiding conscription in the Japanese Army [R. T. 52]. In May of 1939, in the United States, appellant had an operation and his appendix was removed [R. T. 13]. In

January, 1940, eight months later, appellant returned to Japan for the third time [R. T. 12, 66], and within a week reported his arrival in Japan to the Village Office and was told that if he stayed in Japan more than 90 days, he was subject to Japanese military duty [R. T. 49].

In the spring of 1940, appellant received a notice to report in July for a physical examination for the Japanese Army and also had a conversation with the draft man at Esumi [R. T. 14, 48]. He did not go to the United States Consul at Kobe or Osaka at this time [R. T. 55]. He did not have a return ticket to the United States and he did not try to get one at this time. He did not do anything to avoid taking the physical examination in July, 1940 [R. T. 57], and after taking the examination in July 1940, and up until July, 1941, when he entered the Japanese Army, he never discussed with anyone the question of his being inducted into the Japanese Army [R. T. 64].

On July 5, 1940, appellant reported and took the physical examination pursuant to the notice he had received [R. T. 17, 66], and 10 days later, he went to Kobe to talk to a travel agent [R. T. 20].

On July 5, 1941, appellant entered the Japanese Army [R. T. 22, 66], and served therein until September of 1941, after which he did not try to return to the United States [R. T. 64].

3. The Law.

It can be seen from these facts that in this case, unlike most of the other military service cases which have been tried in the District Court, and which appellant has cited in his brief, the appellant served in the Japanese Army prior to the Japanese attack on Pearl Harbor December

7, 1941, and at a time when Japan was not at war with the United States.

The opinion of the District Court, 98 F. Supp. 904 [C. T. 7] indicates that the Court followed the views expressed in the *Podea v. Marshall* case, 83 F. Supp. 216, 179 F. 2d 306, that an inference could be drawn that the service in the Japanese Army was voluntary from the facts that the appellant, with full knowledge of his eligibility for conscription, placed himself in a position to be conscripted and was conscripted. The District Court in the instant case said at page 905 [C. T. 9]:

“The plaintiff knew Japan and knew the conscription laws of Japan. He attended school there. He discussed the matter of his citizenship with the ‘village master’ before his return to the United States in 1935. Again, on the occasion of his visit to Japan in 1938 he discussed the matter of conscription with an ‘official in charge of the draft.’ He states that he asked how he could remove his name from the ‘Family History’ and was told that it could not be done because he was the ‘eldest son.’ He returned to Japan in 1940 on a one way steamship ticket, took his physical examination for the army within three months of his arrival, and remained in Japan for a period of sixteen months between the time of his medical examination and his induction into the army. After his discharge from the army because of ‘kidney trouble,’ he remained in Japan.

Certainly it is not an unreasonable inference to conclude that the plaintiff went to Japan in 1940 for the specific purpose of fulfilling his duty as a Japanese citizen and eldest son, by serving in the army of Japan.

In this type of case there is but one witness, the plaintiff. The defendant has a record of the plaintiff's service in the Japanese army, but there are no witnesses available to refute his statements with respect to the voluntary character of his acts.

* * * * *

The court is not bound to accept testimony even when unimpeached or not directly contradicted, against presumptions or contrary reasonable inferences from other facts in evidence. Such presumptions and inferences create a conflict for the determination of the trier of facts. In passing on the credibility of witnesses and the weight to be given their testimony, the trier of fact may consider their interest in the result of the case, their motives, the manner in which they testify, and the contradictions appearing in the evidence. Applying this test in the instant case leads the court to the conclusion that the plaintiff has failed to overcome the presumption that he was voluntarily expatriated by serving in the Japanese army."

THE PODEA CASE.

In the case of *Podéa v. Marshall*, 83 F. Supp. 216, the Court held that the plaintiff did not sustain the burden of proof that his service in the Roumanian Army was not voluntary, despite the admitted fact that plaintiff was conscripted into the Roumanian Army. The Court's decision was based on the fact that the plaintiff had voluntarily placed himself in a position of peril by returning to Roumania at or about the time he was subject to be drafted into the Roumanian Army, and that having placed himself in a position of peril he could not now use such peril as a cloak.

The facts and the reasoning of a Court are contained in excerpts from the decision as follows:

“Plaintiff was born in the City of Youngstown, Ohio, on September 21, 1912. His parents were nationals of Austria-Hungary.

* * * * *

“Plaintiff was domiciled in Roumania continuously from 1921 to 1942, except for a visit he made to the United States in 1939, * * *.

“In October, 1936, plaintiff was inducted into the army, and, together with his entire class of inductees, took an oath of allegiance to Roumania.

* * * * *

“It is worthy of note at this point that plaintiff admits that during his visit to the United States he knew that he was a Reserve Officer in the Roumanian Army, that war in Europe was imminent, and that he would be called up for service in the event of war. Yet, he preferred to return to Roumania.

“It would appear, therefore, that plaintiff was obliged to act affirmatively in order to retain his American citizenship on and after September 21, 1933. The most persuasive evidence of such election would have been his immediate return to the United States. United States *ex rel.* Scimeca v. Husband, *supra*; Dos Reis *ex rel.* Camara v. Nicolls, 1 Cir., 161 F. 2d 860. Hence, conversely, the law will presume that his continuing domicile constituted an election by him to choose Roumanian nationality unless it can be satisfactorily shown that such continued domicile was under duress, fear of imprisonment or such other circumstances as may have rendered the same involuntary.

* * * * *

“Having failed to act promptly after attaining his majority, the burden was his to satisfactorily explain or excuse his dilatory conduct between September 21, 1933, and the time of his return in 1942.

* * * * *

“In my opinion he failed to sustain his burden by a fair preponderance of the evidence. Neither his education nor military service necessitated his remaining any longer in Roumania, yet, not only did he fail to perfect his rights of American citizenship, but in 1939, he committed a final, fatal act which cut off any future right to election. On a visit to the United States in 1939 *he placed a commercial assignment and the liquidation of his personal affairs in Roumania above the choice to establish his American citizenship*, if it could be said that such choice still survived. The legal effect of his return to Roumania at this time is overwhelmingly against him.

* * * * *

“However, he alleges that such military service was involuntary in that it was induced by compulsion and fear of imprisonment.

“The government, on the other hand, contends that while the plaintiff did not volunteer or serve willingly, yet, having failed to take steps to avoid such service in each instance, he cannot now be heard to say that such service was involuntary. In other words, it claims that plaintiff, having voluntarily placed himself in a position of peril, cannot now use such peril as a cloak.

* * * * *

“I am inclined to agree with the government’s contention that the plaintiff’s actions and conduct, while

they may not prove that plaintiff's service was in fact voluntary, at least cast great doubt on his claim that such service was involuntary.

“The burden is on the plaintiff, and he has failed to sustain it. * * *”

THE DOS REIS CASE.

There is no dispute that the case of *In re Dos Reis ex rel. Camara v. Nicolls*, 161 F. 2d 860, holds that the act of expatriation must be voluntarily done, but it does *not* hold that the mere fact of conscription into an army under a system of universal conscription is duress. As the District Court said during argument [the Reporter's Transcript does not include it], conscription is not involuntary, it is a system, men believe that is the way to raise an army.

The statements in the *Dos Reis* case regarding “attachment to a foreign government,” “giving his all” are not to be considered as separate doctrines laid down by the Court as defenses to expatriation, but are all bits of evidence which the Court considered in determining whether or not duress existed. The facts which constitute duress or prove volition are different in every case and just because in one case the Court found volition based on the fact of “attachment to a foreign government” does not mean that it must be shown in every case that there was such an attachment before the Court can find that the action was voluntary.

THE GOGAL CASE.

There is no dispute that in the case of *In re Gogal*, 75 F. Supp. 265, the Court also follows the view that the action must be voluntary, in other words, that duress is a defense. But that Court did *not* say that the mere fact of conscription proves duress. The Court says at page 271 (as quoted in appellant's brief, pp. 23 and 24), "Where such a person is drafted *over his protest* into foreign military service" loss of nationality is not caused (emphasis supplied). But where was there any protest in the instant case? Protest or some evidence indicating opposition to entering into the military service or intent and desire not to serve must be manifested.

The Court properly inferred, from appellant's voluntary return to Japan and his continuing stay there in time of peace for over 18 months until he was inducted, as he well knew would be the case, that appellant had no state of mind of protest and made no attempt to avoid such service. The witness was before the Court, and as the Court said in its opinion at page 906 (*supra*):

"The Court is not bound to accept testimony, even when unimpeached or not directly contradicted, against presumptions or contrary reasonable inferences from other facts of evidence."

The Court's inference from the facts was proper and supports the findings made.

The other cases of military service and voting which have been tried in the District Courts, all cited by appellant, are of no assistance in determining whether or not duress exists in this case. The facts of each case are different. Most of the other cases represent situations where the entry into the Japanese Army occurred after the outbreak of war with the United States and as late

as 1943-45, and the fact that duress was found to exist in some other case does not prove that it was error for the Court to find the action was voluntary in this case.

In *Savorgnan v. United States*, 338 U. S. 491, the Supreme Court held that the test as to the voluntary or involuntary nature of the expatriating act is "objective."

In *Acheson v. Kuniyuki*, 189 F. 2d 741, 897, this Court reversed the District Court's judgment for the plaintiff and held that the evidence did not support the Trial Court's finding that plaintiff voted involuntarily and that the fact that plaintiff did not *intend* to lose her nationality and did not *know* that she would lose it if she voted in such elections is immaterial.

In *Bauer v. Clark*, 161 F. 2d 397, the Court said:

"He says he was afraid, but there is such a thing as a loyal American citizen being afraid to do his duty and yet doing it, and his statement carries to me no conviction whatsoever."

In the case of *Cantoni v. Acheson*, 88 F. Supp. 576, the Court said:

"Plaintiff contends that at the time he served in the Italian army and took the oath of allegiance to Italy and also at the time he voted in the Italian election, he acted without knowledge that he was entitled to American citizenship. Hence he claims that such acts were not freely or intelligently done. Full and intelligence choice, it is asserted, is essential to effectuate renunciation. Plaintiff now says, not that he was not cognizant at all times of the place of his birth, but that he was not aware of the legal impact of the place of his birth upon his citizenship until the year 1947, when he was almost 31 years of age.

"Having heard his testimony and the other evidence, I am not willing to accept this unilateral ex-

pression as true. From the time he was a boy starting to school he knew that he was born in the United States. His day by day activities, as well as his service in the Italian army, his oath of allegiance to Italy, his voting in the Italian election, were performed with continuing awareness of the place of his birth. All of the circumstances pertaining to his life in Italy, plus my appraisal of him as a witness, are convincing that his statement of unawareness of the consequences of his American birth is unacceptable.

“But even assuming the verity of his alleged belief locked in the secret chamber of his mind until he was past thirty years of age, it does not constitute evidence legally sufficient to sustain his contention that he did not freely and intelligently perform the acts that, under the law, constitute renunciation of American citizenship.

* * * * *

“There is no creditable evidence in this case that the acts of renunciation were not voluntarily and freely done. There was testimony that plaintiff performed military service because he thought he had to and that he voted because he feared some governmental sanctions would otherwise be imposed. But that does not amount to an involuntary or forced act in the sense that he was compelled to perform such acts in spite of an ‘intensity of purpose to retain his American nationality’ *Dos Reis v. Nicolls, supra*, note 3. Any claimed reluctance in the performance of these acts was no more than may have conditioned the minds of many other Italians at the time. The facts do not disclose the kind of duress or involuntariness present in *Dos Reis v. Nicolls, supra*, note 3; *Schioler v. U. S.*, 75 F. Supp. 353 (N. D. Ill. 1948) or *In re Gogal*, 75 F. Supp. 268 (W. D. Penn. 1947).”

THE CONDITIONS IN JAPAN.

The transcript of record, Vol. II, contains the evidence at the trial of the action up to the time the examination of the plaintiff was completed and Exhibit 5 was admitted in evidence. Apparently through inadvertence, the remainder of the trial was not transcribed by the reporter, although the full reporter's transcript was designated by plaintiff as a part of the record. Exhibits 6 to 15 were offered during the remainder of the trial and for the convenience of the Court there is attached as Appendix A to this Brief a list of plaintiff's exhibits. No exhibits were offered by defendant. It will be noted that Exhibits 7 to 12 were admitted in evidence only for the purpose of aiding the Court in taking judicial notice. The Court stated the matters of which he was taking judicial notice (also not transcribed), and our notes indicate his statements to be as follows:

"The Court takes judicial notice that during the years 1940 and 1941 Japan was ruled by a military government, and personal loyalty and service to the emperor and to the state of which he was the head, was a religious and ethical duty as much as it was a governmental principle.

"During that period, loyalty to superiors and filial piety were regarded as unquestionable attributes of the moral man and good subject and in this everyone was to recognize as absolute his individual responsibility to guard and maintain the throne. The eulogy of war was combined with devotion to the emperor. Every subject of Japan was expected by the government to give up their life if necessary for the sake of the emperor. Japan had conscription laws at that time."

The parties hereto are attempting to get the remainder of the transcript above referred to typed and filed in the

Court of Appeals, but it is not known at this time whether or not this can be done because one of the reporters in the case is now in Honolulu.

The Court's attention is directed to Plaintiff's Exhibit 13 in evidence, being the deposition of Hidemitsu Matsuki, a Japanese official in the Japanese conscription system who testified as to the manner of the operation of that system.

Appellant's Brief, page 32, lays great stress on fear of appellant as to what would happen to him if he refused to enter the army when conscripted. The choice here was not limited to entry in the army or punishment for failure, but appellant had the alternative of returning to the country of his birth, the United States, and he failed to do so despite the fact that his physical examination occurred over a year prior to Pearl Harbor.

Apparently the District Court did not believe his testimony that he was afraid. On cross-examination [R. T. 59, 60], appellant admitted he never knew of anyone who had been executed, that he knew that the law provided jail as a penalty [R. T. 60], and the Deposition of Matsuki [App. Ex. 13] corroborates this. If appellant believed there was such a danger, he must have believed it before he returned to Japan in 1940 and exposed himself to the peril, and he thereby rejected his choice of avoiding the peril and we think that the Court was entitled to infer either that he did not believe the consequences he claims or that if he did have such a belief, he intended all along to serve voluntarily if conscripted. Otherwise why would he expose himself to a known peril?

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court that plaintiff was expatriated by reason of entry and service in the army of Japan pursuant to the provisions of Section 401(e) of the Nationality Act of 1940 should be affirmed.

Respectfully submitted,

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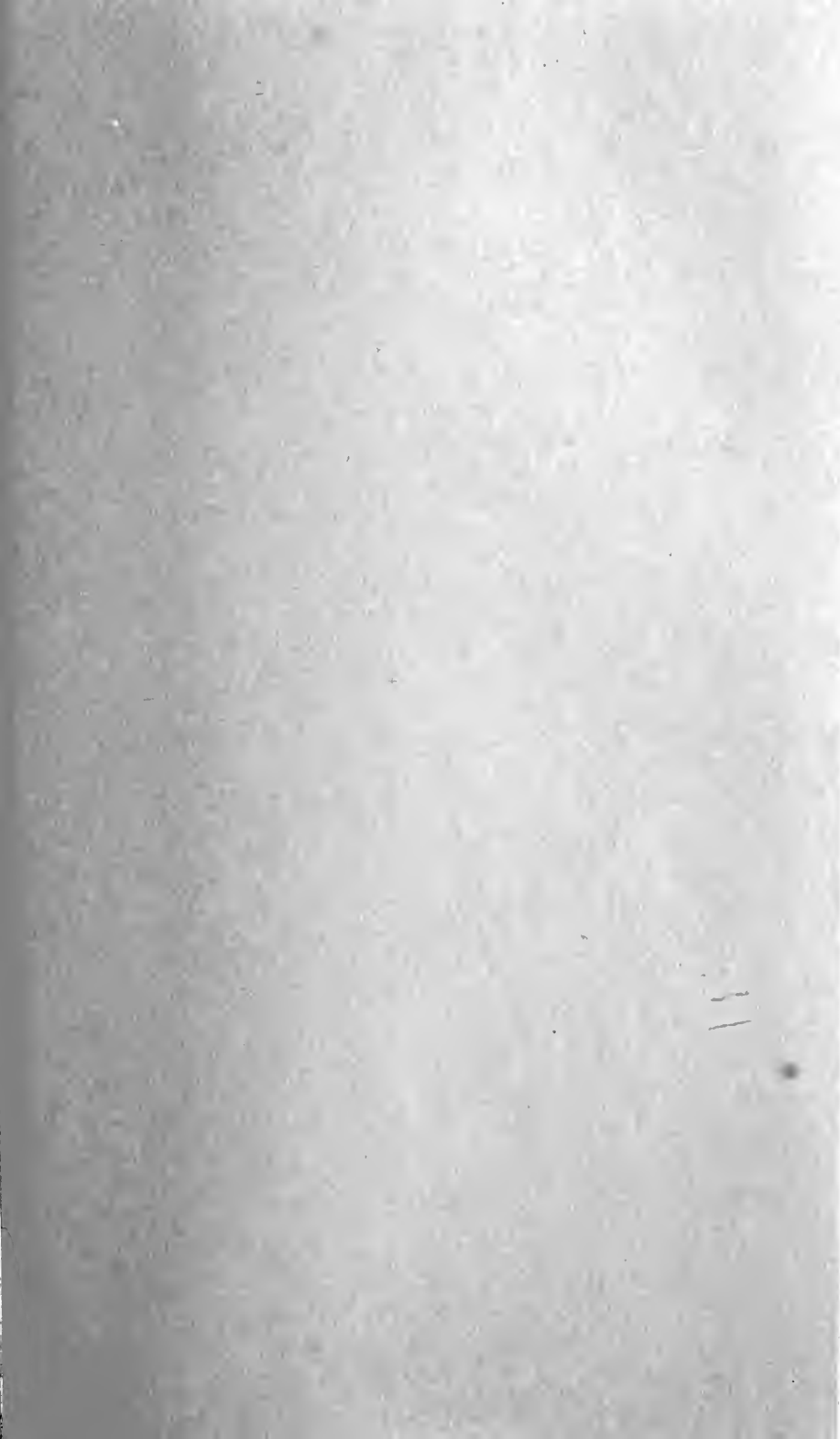
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No. 13137

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TOSHIO KONDO,

Appellant,

vs.

DEAN ACHESON, as Secretary of State,

Appellee.

BRIEF FOR APPELLEE.

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No. 13137

IN THE

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DEAN ACHESON, as Secretary of State,

Appellee.

BRIEF FOR APPELLEE.

Jurisdiction.

The District Court has jurisdiction of the action under provisions of Section 503 of the Nationality Act of 1940 (8 U. S. C. 903) as alleged in Paragraph III of plaintiff's Complaint [C. T. 2]; the necessary factual allegations of "denial of a right or privilege as a national of the United States * * * on the ground that he is not a national * * *" as required by said section, and the claim of residence as permanent within this judicial district, the "denial" being by the head of a department of the United States Government, are properly supplied and put in issue by the pleadings [C. T. 2, 5].

This Court has jurisdiction of the appeal under the provisions of 28 U. S. C. 1291 and 1294(1), there being no dispute as to the finality of the judgment of the District Court.

Statutes Involved.

Sections 401(c) and 402 of the Nationality Act of 1940 (8 U. S. C. 801(c), 802) provide in pertinent parts as follows:

“§801. *General means of losing United States Nationality.*

A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

(c) Entering, or serving in, the armed forces of a foreign state * * * if he has or acquires the nationality of such foreign state; * * *

“§802. *Presumption of expatriation.*

A national of the United States who was born in the United States * * * shall be presumed to have expatriated himself under subsection (c) * * * of Section 801, when he shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state * * * and such presumption shall exist until overcome whether or not the individual has returned to the United States. * * *

Statement of the Case.

Appellant raises two principle questions in his brief herein:

(1) Does the evidence support the Findings of Fact [C. T. 18] and Judgment [C. T. 23] of the District Court that appellant's service in the Japanese Army, while a citizen of Japan, was voluntary and not the result of coercion?

This issue was raised by the pleadings [C. T. 3, 6].

(2) Is Section 401(c) of the Nationality Act of 1940 (8 U. S. C. 801(c)) unconstitutional as being in violation of the Fourteenth Amendment to the United States Constitution?

This issue was raised by the appellant by motion for new trial [C. T. 16].

Statement of Facts.

Appellant was born in the United States at Los Angeles, California, on May 29, 1926 [R. T. 6]. He had Japanese citizenship by registration in the Japanese Family History, and was consequently a dual citizen [R. T. 21, 39].

In December 1927, when appellant was about two years old, his parents, nationals of Japan, took him to Japan where he remained for twenty-two years [R. T. 6, 7], until his return to the United States for the purpose of this proceeding.

Appellant started Japanese primary school in 1933 [R. T. 16] and continued to school until graduating Middle school in March of 1945 [R. T. 9].

His education included military training [R. T. 18, 45], and he was taught to believe that the Japanese Emperor was supreme and that it was an honor to die for him [R. T. 39].

Appellant, in 1936, at the age of ten, knew about Japanese Military Conscription, that he would be subject to it [R. T. 38, 39]. Appellant at no time applied to an American Consulate for registration as an American citizen [R. T. 12, 22].

During the last six months of his schooling in Middle school, appellant was engaged in the making of anti-aircraft bullets at the Kure Naval Arsenal [R. T. 22, 25] and received his notice to report for a physical examination in January, 1945 [R. T. 28].

Appellant entered the Japanese Army in April, 1945, and served for a period of six months to September of that year [R. T. 11]. He made no protest upon being called into the army [R. T. 47], was promoted twice within three months following his induction [R. T. 33], and volunteered for officers training [R. T. 49, 50], being one of ten who passed the examination out of a class of twenty-five [R. T. 35].

After the war appellant returned to school for a short time, then worked [R. T. 41]. In July of 1949, appellant, for the first time, applied to the American Consul for a passport [R. T. 44].

ARGUMENT.

I.

Appellant Acted Voluntarily.

(a) Conditions Existing in Japan.

Appellant's argument in *Hamamoto v. Acheson*, No. 13136, now pending before this Court, is incorporated by reference into Appellant's Brief in this case, and is relied upon as the argument of this appellant. The Court should be advised, however, that certain exhibits referred to in said argument, particularly "Plaintiff's Exhibits 7, 8, 9," were excluded from evidence in the instant case, as were Exhibits 5, 6, 10, and 15. It is therefore presumed that the portions of appellant's argument referring to said excluded exhibits (in the *Hamamoto* case, Appellant's Brief at pages 28, 29, 30, 31 and 32) will be disregarded by this appellee.

However, that the District Court was fully aware of conditions existing in Japan at the time appellant entered the armed services and for some time prior thereto, is obvious from the District Judge's opinion reported at 98 Fed. Supp. 884. The Court states at page 885 [C. T. 9]:

"Plaintiff's counsel in his brief points to the conditions existing in Japan; that it was a totalitarian state ruled by the military authorities; that the people were generally in fear of the authorities and particularly in fear of the military authorities who exercised power over the entire country including the schools where military training was an integral part of the curriculum; that the Japanese boy was subjected to fully organized military training 'including squad drill, target practice, bayonet fighting and the use of hand grenades and other implements of warfare'; that the Home Ministry controlled the in-

timate lives of the Japanese people from the 'cradle to the grave'; and 'In the course of 20 years, Japanese militarists had constructed effective machinery for controlling the speech thoughts and movements of the people.'

Unquestionably counsel presents, in general, an accurate description of conditions existing at the time the plaintiff entered the armed services and for some time prior thereto. Such conditions are typical of a totalitarian state. In effect, the plaintiff contends that one entering the armed services of such a government is not responsible for his actions."

Our own "Hells Kitchen" in New York has spawned both criminals and statesmen. This analogy is here given only for the purpose of demonstrating that "conditions" must be evaluted in the light of their impact, if any, *upon the individual*; and in particular, *upon this appellant*.

Can we blanket situations which revolve upon factual quotients and say that the holding of one case shall be the law of all cases arising from the same geographical location at or about the same period of time?

This Court, in *McGrath v. Abo*, 186 F. 2d 766, refused to accept such a proposition and required a showing of how "conditions" affected each individual.

And in *Acheson v. Kuniyuki*, 189 F. 2d 741, this Court applied the facts to the individual as it affected *her* acts, though the appellee (plaintiff in the court below), cited eleven district court cases—"in each of which a national of the United States who had voted * * * was found to have done so voluntarily."

As to the cases cited by the appellant on pages 25 and 26 of his brief, eight of them were cited to the court

below. The trial court has this to say of them at page 887 of the opinion [C. T. 15]:

“Plaintiff cites a number of cases decided by the District Courts in which the overt acts spelling expatriation were held to be involuntary and suggests, ‘There is no reason why the instant case should be differently decided.’ The questions involved in those cases, as in the instant case, were factual. The facts in each of the several cases are not identical. The trier of fact may not stray beyond the record in front of him in weighing the evidence, and the inferences to be drawn therefrom for the purpose of resolving conflicts.”

(b) Real Attachment to a Foreign Country.

While appellant has raised this point under his discussion of constitutionality, appellee chooses to discuss the point under the question of “coercion” since it is claimed to be a limitation on the voluntariness of appellant’s expatriating act. Appellant has here attempted to add further qualifications to Section 801(c). *Dos Reis v. Nicolls*, 161 F. 2d 860, has in effect added the word “voluntary” to the application of the acts of expatriation enumerated in Section 801. It has never stood for the requirement that “attachment to a foreign country” must be proved. This fiction is lifted bodily from the report of the President’s Cabinet Committee to Congress merely because it is cited in the *Dos Reis* case (*supra*) by the appellant. The language relied upon by the appellant as referring to “motive” or “intent” or “state of mind” clearly is de-

scriptive only of the inference to be drawn from the *acts* of the person, to-wit:

“* * * provisions in the code concerning loss of American nationality * * * are merely intended to deprive persons of American nationality when such persons, *by their own acts* * * * *show* that their real attachment is to the foreign country * * *” (Emphasis added.)

Other phrases such as “free and intelligent choice” and “offering his all in support of a foreign state” are likewise attempts to further limit the acts by circumscribing them with subjective motives and intent. The Supreme Court, however, in *United States v. Savorgnan*, 338 U. S. 491, at page 499 states:

“There is no suggestion in the statutory language that the effect of the specified overt acts, when voluntarily done, is conditioned upon the undisclosed intent of the person doing them.”

This Court, in *Acheson v. Kuniyuki*, *supra*, cited the *Savorgnan* case as support for the following statement in the opinion of this Court at page 744:

“The fact, if it be a fact, that she did not intend to lose her nationality and did not know that she would lose it if she voted in these elections is immaterial.”

In the light of the record in this case, however, it is pointless to quibble over phraseology. It is unnecessary to do so when appellant's testimony in the Court below is examined. He was raised in Japan almost from birth.

He had no recollection of the United States [R. T. 37] and had never been back. He was taught to believe that the Emperor was supreme and that it was an honor to die for him [R. T. 39]. He entered the Japanese Army without protest, was promoted twice in three months, volunteered for officers training [R. T. 33, 47, 49]. The trial court in its opinion at page 887 [C. T. 13] says:

“* * * The history of his background considered with the zeal he displayed in his efforts to accomplish promotion in the Japanese Army, indicates he was more interested in being a ‘loyal son of Japan’ than preserving his status as a national of a country he had never seen after his infancy.”

Surely this is “real attachment to a foreign state” and “shown by his own acts.” And, can it not be said that he “offered his all in support of a foreign state?”

Before leaving proposition I under the main heading “Appellant Acted Voluntarily,” the attention of this Court is respectfully called to the statement of the trial court at page 885 [C. T. 9] which best sums up the argument under Appellee’s first main point:

“In support of his claim that his action was involuntary, plaintiff relies *solely* on the circumstances existing in Japan prior to the surrender of that country to the allied powers. *He does not offer an iota of evidence* to show that he in any way remonstrated against his induction or made any effort to avoid service in the Japanese Army. *On the contrary, his own testimony indicates complete cooperation with the Japanese authorities.*” (Emphasis supplied.)

II.

The Constitutional Question.

The facts of the instant case rob appellant's argument on the constitutional question of its virility. His first point is raised under letter "A" at page 8 of his brief, stating:

"United States Citizenship is not to be taken away or deemed forfeited *except in the clearest cases.*" (Emphasis supplied.)

As we read his later argument it would seem that he contends that it cannot be taken away or forfeited at all. However, since under this point a "clear case" is his measure, appellee submits, and the trial court has agreed, this case is clear.

Appellant then states "The burden of proof is upon the Government." The Government's burden of proof under the Nationality Act was sustained when appellant admitted service in the Japanese army, as alleged in his complaint [C. T. 3], the appellant then having Japanese nationality as required by Section 401(c) and having resided in Japan for more than six months [C. T. 2] and the presumption of Section 402 of the Nationality Act was raised.

The burden of going forward with evidence that would excuse the military service was then upon the appellant who recognized this burden by the allegations in paragraph V of his complaint raising the defense of "coercion" [C. T. 3]. This allegation was denied in appellee's answer [C. T. 6.]

Appellant's next point is raised under letter "B" at page 11 of his brief. It requires the showing of "real

attachment to a foreign country" and has been discussed and answered above by appellee.

Appellee has no argument with Appellant's point "C" that the Section of the Act here in question applies only to voluntary conduct. This view has been adopted in all cases subsequent to the *Dos Reis* case (*supra*) dealing with Section 801 irrespective of the subsection concerned. However, the Third Circuit in adopting this view in *Doreau v. Marshall*, 170 F. 2d 721, 724, warns:

"On the other hand it is just as certain that the forsaking of American citizenship, *even in a difficult situation, as a matter of expediency*, with attempted excuse of such conduct later when crass material considerations suggest that course, is not duress." (Emphasis supplied.)

"Knowledge of the consequences" has been determined by this Court and the Supreme Court whom it followed, as being immaterial. *Kuniyuki* and *Savorgnan* cases (*supra*).

"Free and intelligent choice" as raised by appellant was also raised in the case of *Cantoni v. Acheson*, 88 Fed. Supp. 576, and on very similar facts. There the plaintiff alleged that he did not know when he served in the Italian army that he was entitled to citizenship of the United States and hence such act was not freely and intelligently done. The Court rejected the theory.

Appellant relies finally upon the decision of the District Court in *Okimura v. Acheson*, 99 Fed. Supp. 587, holding that Congress may not condition the loss of citizenship on the doing of an act, other than undergoing the formal process of naturalization in a foreign state. This decision nullifies the considered judgment of Con-

gress as to the conditions under which a citizen of the United States by birth may lose his American nationality.

To a large extent, it invalidates the whole pattern established for dealing with problems of dual nationality and dual allegiance since the reasoning of the District Court would necessarily affect, not only the particular clause of the Nationality Act directly involved, but also all other clauses by which loss of nationality is made dependent on some act other than the process of naturalization.

The decision completely disregards the decisions of the Supreme Court which have implicitly or explicitly rejected the premises upon which the opinion rests. *Savorgnan v. United States*, *supra*; *Mackenzie v. Hare*, 239 U. S. 299; see also *Miranda v. Clark*, 180 F. 2d 257 (C. A. 9); *Ex parte Griffin*, 237 Fed. 445 (N. D. N. Y.).

Said District Court holds that a citizen by birth can lose his nationality only by going through the formal process of naturalization in a foreign state. That position was, however, rejected by the Supreme Court in *Mackenzie v. Hare*, *supra*, when it upheld the validity of Section 3 of the Act of 1907, providing that any American woman who married a foreigner should take the nationality of her husband. Referring to the absence of an express provision in the Constitution giving Congress the right to provide for loss of citizenship—a consideration relied on by the District Court in the *Okimura* case, *supra*—the Supreme Court said, in the *Mackenzie* case, at page 311:

“But there may be powers implied, necessary or incidental to the expressed powers. As a Government, the United States is invested with all the

attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries.”

The *Mackenzie* case also rejected the contention, implicit in said District Court’s opinion, that Congress cannot condition the loss of nationality on any act other than one evincing a subjective intent to renounce American citizenship. Referring to the claim that “no act of the legislature can denationalize a citizen without his concurrence,” the Supreme Court said, 239 U. S. at page 312:

“It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen. The law in controversy does not have that feature. It deals with a condition voluntarily entered into, with notice of the consequences.”

Appellee contends that the “notice of the consequences” above referred to is such legal notice as appears on the face of the act—the knowledge of the law that everyone is presumed to know.

In *Savorgnan v. United States*, 338 U. S. 491, the Supreme Court pointed out, at page 497, that

“Traditionally the United States has supported the right of expatriation as a natural and inherent right of all people, * * *”

and further at page 499, that

“* * * the acts upon which the statutes expressly condition the consent of our Government to the expatriation of its citizens are stated objectively.

There is no suggestion in the statutory language that the effect of the specified overt acts, when voluntarily done, is conditioned upon the undisclosed intent of the person doing them.”

Nowhere in the opinion is there any intimation that the fixing of such objective conditions for loss of nationality is beyond the constitutional power of Congress.

In *Ex parte Griffin*, 237 Fed. 445 (N. D. N. Y.), where the act of expatriation relied on was the taking of an oath of foreign allegiance, the Court, referring to Section 2 of the 1907 Act, said at page 453:

“Conceded that a sovereign cannot discharge a subject from his allegiance and arbitrarily deprive him of his citizenship against his consent, except as a punishment for crime, and that Congress cannot abridge or enlarge the rights of citizens * * *; still the right of a citizen to expatriate himself exists * * * and the sovereign power, through Congress, may declare that the doing of certain acts, inconsistent with citizenship in the United States, shall constitute expatriation—loss of or renunciation of citizenship.”

In *Miranda v. Clark*, 180 F. 2d 257, this United States Court of Appeals for the Ninth Circuit held that Section 401(e) of the Nationality Act of 1940 (8 U. S. C. 801(e)), providing for loss of citizenship by voting in a political election in a foreign state, was constitutional. It ruled that the provisions of the statute “bind the courts unless it can be said that they are clearly unconstitutional, a conclusion without rational foundation.”

Conclusion.

The District Court in the instant case has applied the applicable presumptions and has resolved such conflict as the presumptions and inferences drawn from the facts in evidence may have created, which indeed, as the trier of fact, it was his duty to do.

Cohen v. C. I. R., 2 Cir., 148 F. 2d 336;

Elsig v. Gudwangen, 8 Cir., 91 F. 2d 434;

Gibson v. So. Pac. Co., 5 Cir., 67 F. 2d 758;

Quock Ting v. United States, 140 U. S. 417.

There is ample evidence to support the Findings of Fact and the Judgment. Appellee submits that the judgment should be affirmed.

Respectfully submitted,

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No. 13138

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

PAT DUBY, Doing Business as Pat Duby Com-
pany and CONTINENTAL CASUALTY
COMPANY, a Corporation,

Appellees.

Transcript of Record

Appeal from the United States District Court,
Western District of Washington
Northern Division.

FILED.

FEB - 6 1952

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

PAUL P. O'BRIEN
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States District Court, Western District of
Washington, Northern Division
No. 2211

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PAT DUBY, Doing Business as PAT DUBY
COMPANY, and CONTINENTAL CAS-
UALTY COMPANY, a Corporation,
Defendants.

COMPLAINT

Plaintiff respectfully alleges and shows to the
Court:

I.

That jurisdiction of this action is conferred upon
this Court by Sec. 1345, Title 28, U. S. Code.

II.

That the United States of America is now and
at all times mentioned herein has been a corpora-
tion sovereign and in such capacity brings this suit.

III.

That the Department of Commerce is a depart-
ment of the Federal Government in charge of Civil
Aeronautics Administration.

IV.

That Pat Duby, at all of the times hereinafter
mentioned was a sole trader doing business under
the style of Pat Duby Company, and Continental
Casualty Company is a corporation, organized and
existing under and by virtue of the laws of the

State of Indiana, duly authorized as surety under Government contracts.

V.

That on or about the 7th day of September, 1944, the plaintiff, by and through the Department of Commerce, Civil Aeronautics Administration, by Proposal No. 7-45-109, called for bids for the construction of four concrete check dams, and one twin-barrel concrete box culvert at the Seattle-Tacoma Airport, Seattle, Washington, and thereafter defendant Pat Duby bid the sum of \$6,602.70 for the job, said bid being the lowest and best bid received therefor, which said bid was accepted.

VI.

That thereafter and on, to wit, the 4th day of October, 1944, a formal written contract was entered into between the parties, the same being negotiated Contract No. C7ca1454, by the terms of which defendant Pat Duby agreed to perform the said work of constructing four concrete check dams and one twin-barrel concrete box culvert for plaintiff at the Seattle-Tacoma Airport, Seattle, Washington, for the total sum of \$6,602.70, said work to commence within five calendar days after date of notice to proceed, to be completed within thirty calendar days from that date, which time was subsequently extended an additional sixteen days.

VII.

That by the terms of Proposal No. 7-45-109 and particularly paragraph "H" thereof, is the following:

“Liquidated Damages. Subject to the provisions of Article 9 of the contract, the contractor shall be charged liquidated damages for each day of delay in completion of the schedule, as follows:

“Schedule 1—\$20.00 per calendar day.”

VIII.

That instead of completing said contract in the allotted forty-six days provided in said contract and extensions thereof, Defendant Pat Duby consumed a total of one hundred seventy-nine days, or one hundred thirty-three days in excess of the time limited for the completion of said work, and by reason of said delay and under the terms of said Proposal No. 7-45-109 and paragraph 9 of said contract, Defendant Pat Duby and his surety, Continental Casualty Company, became indebted to plaintiff in the sum of \$2,660.00, demand for the payment of which has been made and refused and by reason thereof defendants are indebted to plaintiff in the sum of Two Thousand Six Hundred and Sixty Dollars (\$2,660.00).

Wherefore, plaintiff prays for judgment against defendants in the sum of \$2,660.00, together with its costs and disbursements herein expended.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Assistant U. S. Attorney.

[Endorsed]: Filed March 15, 1949.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT,
CONTINENTAL CASUALTY COMPANY

Comes now the defendant, Continental Casualty Company, and for answer to the complaint of the United States of America, admits, denies and alleges as follows, to wit:

I.

Admits Paragraphs I, II, III and IV of said complaint.

II.

Answering Paragraphs V, VI, VII and VIII, this answering defendant states that the whereabouts of the defendant, Pat Duby, is unknown to this defendant; that this defendant was never supplied with a copy of said contract referred to in plaintiff's complaint or the specifications thereof or Proposal No. 7-45-109 or any information, data or documents relative thereto and consequently is unable to state whether or not the allegations contained in Paragraphs V, VI, VII and VIII of plaintiff's complaint are true or false and, therefore, upon information and belief deny the same and each and every part thereof and particularly deny that the plaintiff has occasioned any loss or damage due to said delay, if any, and particularly denies that the defendant, Continental Casualty Company, is indebted to the plaintiff in the sum of \$2,660.00, or any other sum whatsoever, or at all.

By Way of Further Answer and as a First Affirmative Defense, this defendant is informed and believes and, therefore alleges on information and belief as follows, to wit:

I.

That the defendant, Pat Duby, was awarded a contract by the United States of America to construct at the Seattle-Tacoma Airport at Seattle, Washington, four concrete check dams and one twin-barrel concrete box culvert for a total estimated price of \$7,562.70. That neither the plaintiff nor the defendant, Pat Duby, knew the special circumstances and conditions existing underneath the ground at said time or place. That thereafter when the defendant, Pat Duby, commenced construction of said work it was found that a large body of quicksand existed under the surface crust, thereby making the defendant, Duby's, work exceedingly difficult and imposed upon him a hardship and considerably increased cost and expense in coping with said quicksand. That by virtue thereof there was no meeting of minds in the awarding and accepting of said contract. That nevertheless and despite the additional hardship, cost and expense the defendant, Duby, finished and completed said contract in accordance with the plans and specifications thereof.

II.

That because of said quicksand condition and the difficulty encountered, the performance of said work required additional time. That the plaintiff granted

to the defendant, Duby, an extension of 16 days but such extension was inadequate and not sufficient and that thereafter all further or additional requests by the defendant, Duby, for extension of time were arbitrarily denied and refused despite the unforeseen circumstances and difficulties encountered.

III.

That plaintiff has computed as the penalty under said contract for delay in the completing of said job the amount of \$2,660.00 and withheld from the final payment owing to the defendant, Duby, the sum of \$979.82 in reduction of said claimed penalty or forfeiture of \$2,660.00.

IV.

That as the direct result of performing and completing said job, the defendant, Pat Duby, became insolvent and filed petition for adjudication in bankruptcy in this court, the same being File No. 37366, on June 28, 1944, and was thereafter adjudicated as a bankrupt on June 30, 1945, and discharge thereafter granted on November 14, 1945. That this defendant, Continental Casualty Company, did pay into the registry of the court for the satisfaction of the claims of labor and material men on said job the full amount of its payment bond in the amount of \$3,285.35 and that the United States Government in connection with said contract has received work, labor and material of the value far in excess of the contract awarded to defendant, Pat Duby, and that it is inequitable, unjust and unfair that said United

States Government apply or attempt to apply at this time the penalty or forfeiture of \$20.00 per day claimed for the delay in the completion of said job. That said complaint alleges or sets forth no damage of any kind as a result of said delay.

By Way of Further Answer and as a Second Affirmative Defense, this defendant is informed and believes and, therefore alleges on information and belief as follows, to wit:

I.

That this defendant, Continental Casualty Company, was never notified by the plaintiff or given any notice of any kind or character as to the default or alleged default or delay in performance by the said defendant, Duby, or of any claim made or contemplated to be made against this defendant for liquidated damages as a result of the delay in completion of said contract by the defendant, Duby. That by reason of the failure of the United States of America to notify this defendant of its claim or proposed claim, this defendant was unable to and therefore did not file a contingent claim in the bankruptcy proceedings of the defendant, Duby, and thereby lost its right and privilege of claiming a priority therein by subrogation to the government's sovereign right which would have given it the preference of all claims except wages. That because of the delay in notifying this answering defendant of such claim or intended claim, the

plaintiff is now estopped from making such claim and is guilty of laches.

By Way of Further Answer and as a Third Affirmative Defense, this defendant is informed and believes and, therefore alleges on information and belief as follows, to wit:

I.

That the said plaintiff, United States of America, did not in any manner notify the defendant, Continental Casualty Company, as surety for the defendant, Pat Duby, of any default by the said Duby in the performance of said contract or of any delay in the performance thereof, nor did the said plaintiff cancel or attempt to cancel said contract of defendant, Duby, thereby giving the opportunity to this answering defendant to minimize the damage or to itself perform the said contract. That all the while the United States Government was claiming a breach of contract by the defendant, Duby, and without notifying this answering defendant, as surety of the defendant, Duby, of such breach or delay, the said plaintiff continued after the alleged breach to make progress payments to the defendant, Duby, of moneys earned under the contract, all to the great prejudice and damage of this answering defendant; that the plaintiff should have impounded and withheld all progress payments immediately following the date set for completion of the construction contracted for.

By Way of Further Answer and as a Cross-Complaint Against the defendant, Pat Duby, the defendant, Continental Casualty Company, complains and alleges as follows, to wit:

I.

This cross-complaining defendant, Continental Casualty Company realleges and makes a part hereof as though fully set forth at length herein Paragraphs I, II, III, and IV of plaintiff's complaint together with this answering defendant's First, Second and Third Affirmative Defenses herein.

II.

That plaintiff herein complains and alleges that defendant, Pat Duby, breached the contract which was awarded to him by the plaintiff for the construction at Seattle-Tacoma Airport at Seattle, Washington, of four concrete check dams and one twin-barrel concrete box culvert in that said Duby did not complete said contract within the time allowed by said contract and is claiming a penalty and forfeiture for such delay.

III.

That in connection with the issuance of the defendant, Continental Casualty Company's surety bond in connection with said contract in the amount of \$3,280.35 and for a part of the consideration for the issuance thereof defendant, Pat Duby, did execute and file an application directed to Continental Casualty Company for the purpose of securing such

bond. That among other things said application for bond contains the following words and phrases, to wit:

“Second. To indemnify the company against all loss, costs, damages, expenses and attorney’s fees whatever and any and all liability therefor sustained or incurred by the company by reason of executing said bond or bonds or any of them; in making any investigation on account thereof; in prosecuting or defending any action brought in connection therewith; in obtaining release therefrom, and in enforcing any of the agreements herein contained.”

IV.

That in the event of plaintiff in this case recovering judgment against defendant, Continental Casualty Company, as prayed for in its complaint, or otherwise, then under said bond application and said bond, the Defendant Continental Casualty Company is entitled to and hereby demands judgment in an equal amount, plus costs and attorneys’ fees, against Pat Duby, doing business as Pat Duby Company.

Wherefore, having fully answered plaintiff’s complaint, this answering defendant, Continental Casualty Company, prays that said complaint be dismissed and held for naught and further demands that in the event that judgment is rendered in favor of plaintiff against defendant, Continental Casualty Company, that said defendant, Continental Casualty Company, have and recover judgment in an equal

amount, plus its costs and disbursements and a reasonable attorneys' fee against the defendant, Pat Duby.

/s/ WILLARD E. SKEEL,
Attorney for Defendant,
Continental Casualty Co.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 12, 1950.

[Title of District Court and Cause.]

ANSWER AND AFFIRMATIVE DEFENSES
OF PAT DUBY, DEFENDANT HEREIN

Comes now the Defendant, Pat Duby, doing business as Pat Duby Company, and by way of Answer herein, admits, alleges and denies in the form and manner as follows, to wit:

I.

This answering defendant admits the allegations contained in Paragraphs I, II, III and IV of the plaintiff's complaint.

II.

Answering Paragraphs V and VI of the complaint herein, this defendant admits the execution of the contract mentioned in said paragraphs, provided, however, that this defendant is not presently fully familiar with the exact figure named in said contract, and this defendant does not presently have the information with regard thereto available to him.

III.

Answering Paragraph VII of the complaint herein, this answering defendant admits the same.

IV.

Answering Paragraph VIII of the complaint, this defendant admits that there was delay in the completion of the said contract and particularly alleges that any delay in the completion of said contract was not due to any fault on the part of the answering defendant; and further answering said Paragraph VIII, this defendant denies the same and each and every part thereof not herein expressly admitted, and particularly denies that he is indebted to said plaintiff in the sum of \$2,660.00 as alleged in said complaint or in any other sum.

Further answering said complaint and by way of First Affirmative Defense herein, this defendant alleges:

I.

That the substance and gist of the contract mentioned in the plaintiff's complaint had to do with excavation and other work below the surface of the ground where the work was to be carried on; that at the time of the making of the estimate as to the nature of the work to be performed and the cost thereof, the plaintiff estimated and represented to this defendant that the conditions incident to the work involved were normal conditions; that this defendant entered his bid to do the said work upon the representation of the plaintiff that the conditions incident to said work were normal, and this

defendant made his bid based upon the mutual understanding as between plaintiff and defendant that the conditions surrounding the said work and operation would be normal in character.

II.

That when and as the defendant entered upon and undertook the performance of said contract and it was found that the conditions beneath the surface of the ground were such that work could not be carried on normally, that the under surface was of such a condition that great additional expense was involved, that upon learning of the said adverse conditions, this defendant negotiated with the representatives of the plaintiff through the Civil Aeronautics Authority and the representatives of said Civil Aeronautics Authority represented to this defendant that an adjustment would be made as to the amount to be received for the said work and represented to the defendant that the plaintiff would pay such additional amount as would be necessary to cover the unanticipated costs.

III.

This defendant alleges upon information and belief that the local representative of the Civil Aeronautics Authority represented to this defendant that the question of an adjustment would be formally submitted to the proper authorities representing the plaintiff and that action would be taken thereon; that this defendant, relying upon said assurances by the representative of the plaintiff, continued to cause to be carried on the work involved.

IV.

That notwithstanding said arrangements for an adjustment, no adjustment has ever been made to the knowledge of this defendant.

V.

This defendant further alleges that he and his sureties on the bond filed by the Continental Casualty Company, a corporation, at a very great additional expense, completed the work, and that the reasonable cost of the work contemplated by said contract was and is, to wit, the sum of Twelve Thousand Dollars (\$12,000.00), and that the plaintiff herein has never paid out and expended any greater sum on account of the said work than, to wit, the sum of Five Thousand Seven Hundred Twenty-three and 92/100 Dollars (\$5,723.92).

VI.

This defendant further alleges that the plaintiff herein has never paid the full agreed contract price stated in the original contract, and that the plaintiff has in fact wrongfully withheld the sum of Nine Hundred Seventy-nine and 8/100 Dollars (\$979.08) from the amount stipulated in the said contract as the contract price.

VII.

That by reason of the matters and things herein alleged, the plaintiff herein has been wrongfully enriched in the sum of Nine Hundred Seventy-nine and 8/100 Dollars (\$979.08) withheld from the original contract price and wrongfully converted by

the plaintiff, and has been further unjustly enriched by reason of the matters and things as herein alleged in the difference between, to wit, Twelve Thousand Dollars (\$12,000.00) and Six Thousand Two Hundred Two and 70/100 Dollars (\$6,202.70).

VIII.

That any effort on the part of the plaintiff to recover any further or additional sums by reason of the execution of said contract and by reason of the terms thereof is inequitable and unconscionable and is wholly unjustified and cannot in good conscience be allowed.

IX.

This defendant further alleges that if plaintiff has been damaged by reason of any matters and things alleged and covered by the pleadings herein, that said damage is technical only and that said damage, if any, is within the rule of "Damage Absque Injuria."

For a second and further affirmative defense, this defendant alleges:

I.

Without waiving any matters or things heretofore set forth in this Answer and set forth in the First Affirmative Defense herein, this defendant further alleges that on or about, to wit, the 28th day of June, 1945, he filed his voluntary petition in bankruptcy and was adjudicated bankrupt on the 30th day of June, 1945; that said proceedings were had under File No. 37366 in the United States

District Court for the Western District of Washington, Northern Division, and this defendant pleads all matters appearing and shown in the record of said bankrupt proceeding by way of defense herein the same as though set forth and alleged herein in words and figures.

II.

That in the petition and schedules filed by this defendant as aforesaid, this defendant listed the United States of America as a creditor, and the plaintiff was in all respects given notice of the pendency of said bankruptcy proceeding; that in said schedules the Continental Casualty Company, one of the defendants in the above-entitled cause, was duly and regularly listed as a creditor, and the facts and circumstances making it necessary to make the said listings definitely referred to, outlined and explained the matters and things involved in this litigation.

III.

That neither the United States of America nor the said Continental Casualty Company, one of the defendants herein, ever filed any claim against this defendant and never asserted or brought matters pertaining thereto to the attention of the court in said bankruptcy proceeding, which said court at said time had ample jurisdiction to consider said matters; that under date of November 14, 1945, this defendant herein was granted a discharge in said bankruptcy proceeding, which said discharge as shown by the Order of Discharge is by way of

reference pleaded and made a part hereof the same as though incorporated herein in words and figures.

IV.

This defendant further alleges by way of defense herein that any claims asserted or to be asserted in this cause by the plaintiff herein or by the defendant Continental Casualty Company, are not within the exceptions to a discharge as appears in Chapter 3 of Section 17 of the Acts of Congress relating to bankruptcy, being known generally as the Chandler Act and approved June 22, 1938.

By way of Third Affirmative Defense herein, this defendant alleges:

I.

Without waiving any of the things raised in the Answer herein and without waiving any matters set forth in the First and Second Affirmative Defenses herein, this defendant alleges that the claim alleged and asserted by the plaintiff herein is in fact a penalty claim, and defendant further alleges that claims arising and sounding in and by way of penalty and penalty claims are not provable claims in bankruptcy and as against a bankrupt in bankruptcy proceedings, and that whether the said claim is provable or not, that the same is in all respects reduced to no force and virtue by reason of the discharge in bankruptcy hereinbefore pleaded.

Wherefore, this defendant having fully answered herein, prays:

1. That the plaintiff take nothing by reason of

the alleged cause of action set forth in the complaint herein, and that said complaint be in all respects dismissed and that this defendant have and recover his costs herein.

2. That it be held and adjudged herein that any damage suffered by the plaintiff herein is technical in character and that any alleged damage is "Damage Absque Injuria."

3. And that it be further held and adjudged herein that any claims asserted by the plaintiff herein are inequitable and unconscionable and of such nature and character as to shock the conscience of a chancellor.

/s/ HENRY W. PARROTT,
Attorney for Pat Duby, Doing Business as Pat
Duby Company, Defendant.

[Endorsed]: Filed July 14, 1950.

[Title of District Court and Cause.]

ANSWER OF PAT DUBY, DEFENDANT
HEREIN, TO CROSS-COMPLAINT OF
CONTINENTAL CASUALTY COMPANY,
A CORPORATION

Comes now the defendant, Pat Duby, doing business as Pat Duby Company, and by way of Answer and Affirmative Defense as against the Cross-Complaint of Continental Casualty Company, ad-

mits, alleges and denies in the form and manner as follows, to wit:

I.

The defendant Continental Casualty Company has interposed, served and filed a cross-complaint as against the defendant, Pat Duby, which said cross-complaint appears on pages 5, 6 and 7 of the Answer of said defendant Continental Casualty Company to the Complaint of the plaintiff herein.

II.

By way of answer to said cross-complaint, this defendant denies each and every allegation contained therein not herein expressly admitted, and particularly denies that he is indebted to the defendant Continental Casualty Company in the sum of \$3280.35 plus interest and costs or in any other sum.

By way of further answer herein and by way of affirmative defense herein, this defendant, Pat Duby, alleges:

I.

That on the 28th day of June, 1945, he filed his voluntary petition in bankruptcy in cause No. 37366 in the United States District Court for the Western District of Washington, Northern Division, and that he was adjudicated a bankrupt on the 30th day of June, 1945.

II.

That in his petition and schedules he named the defendant Continental Casualty Company, a corporation, as a creditor, and did particularly de-

scribe and make reference to his dealings with said Continental Casualty Company, a corporation, and did in his said schedules and petition particularly describe his relations with said company as having to do with the contract mentioned and described in the complaint of the plaintiff and in the Answer of the said defendant company; that said defendant company as a corporation received official and proper notice of the pendency of said bankruptcy proceeding, and had a full and complete opportunity and an exclusive opportunity to have all matters pertaining thereto settled and determined in said bankruptcy proceeding.

III.

That on the 14th day of November, 1945, the defendant, Pat Duby, was granted a discharge in bankruptcy discharging him from all liability arising by reason of the matters and things as shown in said petition and schedules and as is indicated and disclosed in the complaint herein and the Answer of the said defendant company.

IV.

That this defendant particularly sets forth by reference the records and proceedings of the above-entitled court in the said bankruptcy proceedings the same as though particularly set forth, alleged and repeated herein in words and figures.

Wherefore, this defendant having fully answered herein, prays that neither the plaintiff nor the defendant Continental Casualty Company, a cor-

poration, take anything as against him, and that it be held and adjudged that any liability ever incurred by said Pat Duby through the plaintiff or the said defendant company is fully and completely discharged, and that this defendant have such further, other and appropriate relief herein as may be proper in the premises and compatible with the usages and practices of the court.

/s/ HENRY W. PARROTT,

Attorney for Defendant, Pat Duby, Doing Business
as Pat Duby Company.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 20, 1950.

[Title of District Court and Cause.]

REPLY OF PLAINTIFF TO ANSWER OF
DEFENDANT PAT DUBY

Comes now the plaintiff in the above-entitled action and for reply to the affirmative matter set up in the answer of defendant, Pat Duby, doing business as Pat Duby Company, admits and denies as follows:

First Affirmative Defense

I.

By way of reply to paragraph I, plaintiff admits that the contract involved had to do with excavation work below the surface of the ground, but denies

each and every other allegation, matter and thing therein contained and the whole thereof.

II.

For reply to Paragraph II, plaintiff denies the same.

III.

For reply to Paragraph III, plaintiff denies the same.

IV.

For reply to Paragraph IV and Paragraph V, plaintiff denies the same.

V.

For reply to Paragraph VI, plaintiff denies it has wrongfully withheld from defendant, Pat Duby, the sum of \$979.08, or any other sum whatsoever.

VI.

For reply to Paragraph VII, plaintiff denies that it has been unlawfully enriched in the sum of \$979.08 or any other sum or sums whatsoever, arising out of the transaction herein involved and especially does it deny that it has been unjustly enriched in said transaction in the sum of \$6202.70, or any other sum whatsoever.

VII.

For reply to Paragraph VIII, plaintiff denies the same and the whole thereof.

VIII.

For reply to Paragraph IX, plaintiff denies the same.

Second Affirmative Defense

I.

Replying to Paragraph I, plaintiff admits that defendant, Pat Duby, on or about June 25, 1945, filed his voluntary petition in bankruptcy and was adjudicated a bankrupt in Cause No. 37366 of the records and files of this Court, but denies each and every other allegation, matter and thing therein contained.

II.

Replying to Paragraphs II and III, plaintiff admits the same.

III.

Replying to Paragraph IV, plaintiff denies the same.

Third Affirmative Defense

I.

Replying to Paragraph I, plaintiff denies each and every allegation, matter and thing therein contained and the whole thereof.

Wherefore, having fully replied, plaintiff prays the judgment of this Court as in its complaint herein set forth.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Assistant United States
Attorney.

[Endorsed]: Filed August 17, 1950.

[Title of District Court and Cause.]

REPLY TO ANSWER OF CONTINENTAL
CASUALTY COMPANY

Comes now the plaintiff in the above-entitled action and for reply to the affirmative matter set up in the answer of defendant Continental Casualty Company, admits, denies and alleges.

First Affirmative Defense

I.

Replying to Paragraph I, plaintiff admits that defendant, Pat Duby, was awarded a contract by plaintiff to construct four concrete check dams and one concrete box culvert at the Seattle-Tacoma Airport at Seattle for the price of \$7,562.70, and that neither party knew of the conditions existing underneath the ground at said time or place, and that quicksand was encountered, but denies each and every other allegation, matter and thing therein contained.

II.

Replying to Paragraph II, plaintiff admits that a sixteen-day extension was granted by plaintiff to defendant on said job, but denies each and every other allegation, matter and thing therein contained and the whole thereof.

III.

Replying to Paragraph III, plaintiff admits the same.

IV.

Replying to Paragraph IV, plaintiff admits the

bankruptcy of defendant Pat Duby, but denies each and every other allegation, matter and thing in said paragraph, and the whole thereof.

Second Affirmative Defense

I.

Replying to Paragraph I, plaintiff denies each and every allegation, matter and thing therein contained and the whole thereof.

Third Affirmative Defense

I.

Replying to Paragraph I, plaintiff denies each and every allegation, matter and thing therein set forth and the whole thereof.

Wherefore, having made full reply to the new matter set up in the answer of defendant Continental Casualty Company, plaintiff prays the judgment of this Court as in its complaint set forth.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Assistant United States
Attorney.

[Endorsed]: Filed August 17, 1950.

[Title of District Court and Cause.]

**MOTION TO REQUIRE PLAINTIFF TO
PRODUCE DOCUMENTS**

Comes now defendant, Continental Casualty Company, by and through its attorneys of record, Skeel, McKelvy, Henke, Evenson & Uhlmann, and respectfully moves this Honorable Court for an order requiring plaintiff to produce and permit the inspection and copying of the following designated documents and to require plaintiff to produce said documents at the time of the trial, all in accordance with Rule 34, the Rules of Civil Procedure for District Courts of the United States.

The documents above referred to are as follows:

1. Copy of Contract No. C7ca-1454 for the construction of four concrete check dams and one twin-barrel concrete box culvert at the Seattle-Tacoma Airport entered into between the United States of America and Pat Duby.

2. A record and itemized listing of the dates and amounts of payments made under said contract by the United States of America to the contractor, Pat Duby.

3. Copies of any and all notices and/or letters claimed to have been given by the United States to Continental Casualty Company concerning the alleged delay or default of the contractor in the performance of said contract together with copies

of any and all notices or letters of claims by the United States of America against defendant, Continental Casualty Company, for liquidated damages.

This motion is supported by Affidavit of Willard E. Skeel, attached hereto.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

By /s/ WILLARD E. SKEEL,
Attorneys for Defendant, Continental Casualty
Company.

State of Washington,
County of King—ss.

Willard E. Skeel, being first duly sworn on oath, deposes and says:

That he is one of the attorneys of record for the defendant, Continental Casualty Company, in the above action and that this affidavit is made in support of the foregoing motion for the production of documents. That Continental Casualty Company was never given, nor has it had access to, a copy of the contract mentioned in said motion. That the whereabouts of the defendant, Pat Duby, principal, upon the bond issued by Continental Casualty Company, as surety, is unknown and consequently this defendant cannot obtain a copy of said contract from the defendant, Pat Duby, nor can there be obtained from the defendant, Pat Duby, for the same reason a record of the dates and amounts of payments

made by the United States to the contractor, Pat Duby.

That the foregoing motion and affidavit were made in accordance with Rule No. 34 of the Rules of Civil Procedure.

/s/ WILLARD E. SKEEL.

Subscribed and sworn to before me this 12th day of April, 1951.

[Seal] /s/ DONALD S. VOORHIES,
Notary Public in and for the State of Washington,
Residing in Seattle.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 12, 1951.

[Title of District Court and Cause.]

NOTICE OF HEARING MOTION

To United States of America and to J. Charles Dennis, Its Attorney:

You, and Each of You, will please take notice that the defendant, Continental Casualty Company's, Motion for the production and discovery of documents will be heard before the above-entitled court on Monday, the 16th day of April, 1951, in the United States Court House, Seattle, Washington,

at 10 o'clock a.m. or as soon thereafter as the same may be heard.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

By /s/ WILLARD E. SKEEL,
Attorneys for Defendant, Continental Casualty
Company.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 12, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on for trial before the undersigned, the Honorable John C. Bowen, senior, judge of the United States District Court, Western District of Washington, Northern Division, sitting without a jury on the 24th day of April, 1951; plaintiff, United States of America, being represented by John E. Belcher, Assistant United States Attorney, and the defendant, Pat Duby, being present in court and represented by his attorney of record, Henry Parrott, and the defendant, Continental Casualty Company, being represented by its attorney of record, Willard E. Skeel; and all parties having announced that they were ready for trial; and the court being possessed of jurisdiction of the cause and evidence and testimony having been adduced on behalf of all parties; and said cause

not being concluded on that day was continued for the purposes of completing the testimony and trial of said cause to May 1, 1951, and from that date until May 25, 1951, at 2:00 o'clock p.m., at which time the testimony was completed and final argument made for and on behalf of all parties; and the court at the conclusion of the said final argument, wishing counsel to submit additional or supplemental briefs and to argue the matter further, the same was continued for the purpose of preparing and filing such supplemental briefs to June 11, 1951, and at said time such supplemental briefs having been filed and an additional argument made and presented on behalf of all parties; and the court having considered the evidence and law in the case did at such time render its oral decision against the plaintiff in favor of both defendants and does hereby make the following

Findings of Fact

I.

The jurisdiction of this action is conferred upon this court by Section 1345, Title 28 U.S. Code.

II.

That the United States of America is now and at all times mentioned herein has been a corporation sovereign and in such capacity did bring this action by issuance of its summons and complaint herein.

III.

That the Department of Commerce is a depart-

ment of the Federal Government in charge of Civil Aeronautics Administration.

IV.

That Pat Duby, at all of the times hereinafter mentioned was a sole trader doing business under the style of Pat Duby Company, and Continental Casualty Company is a corporation, organized and existing under and by virtue of the laws of the State of Illinois, duly authorized as a surety under Government contracts and authorized to do a surety business in the State of Washington.

V.

That on or about the 7th day of September, 1944, the plaintiff, by and through the Department of Commerce, Civil Aeronautics Administration, by Proposal No. 7-45-109, called for bids for the construction of four concrete check dams, and one twin-barrel concrete box culvert at the Seattle-Tacoma Airport, Seattle Washington, and thereafter defendant, Pat Duby, bid the sum of \$6,602.70 for the job, said bid being the lowest and best bid received therefor, which said bid was accepted.

VI.

That thereafter and on, to wit, the 4th day of October, 1944, a formal written contract was entered into between the parties, the same being negotiated contract No. C7ca1454, by the terms of which defendant, Pat Duby, agreed to perform the said work of constructing four concrete check dams and one twin-barrel concrete box culvert for plaintiff at the Seattle-Tacoma Airport, Seattle, Washington, for

the total sum of \$6,602.70, said work to be commenced within five calendar days after date of notice to proceed, to be completed within thirty calendar days from that date, which time was subsequently extended an additional sixteen days for additional work requested to be done by the plaintiff.

VII.

That by the terms of Proposal No. 7-45-109 and particularly paragraph "H" thereof, is the following:

"Liquidated Damages. Subject to the provisions of Article 9 of the contract, the contractor shall be charged liquidated damages for each day of delay in completion of the schedule, as follows:

"Schedule 1—\$20.00 per calendar day."

VIII.

That thereafter and on or about October 4, 1944, defendant Duby received notice to proceed with the work and did thereafter proceed. That thereafter in proceeding with the work, defendant Duby encountered quicksand conditions under the crust of the earth which were not known to him at the time of entering into the contract nor were said conditions known to the government at said time. That as the season progressed that the said defendant Duby encountered excessive rainfall and wet conditions which, coupled with his encounter of a large body of quicksand, rendered completion of the work within the time limited under the contract most

difficult and burdensome. That said contract called for completion thereof within thirty days from October 4, 1944, to wit, November 4, 1944, but for additional work requested by the government which was performed by the defendant Duby a sixteen-day extension was granted bringing the time for completion to November 20, 1944.

That because of the excessive rainfall and the encounter with the quicksand, defendant Duby did not complete the contract until April 2, 1945, although the work was substantially completed, all except the cleanup, January 12, 1945. That the defendant, Pat Duby, consumed in the progress of the work one hundred thirty-three days in excess of the time limited for the completion of said work under the terms of the government proposal and by reason of such delay the United States commenced this action for the recovery of liquidated damages at the rate of \$20 per day or a total of \$2,660.

IX.

That the claim of the government for liquidated damages for delay in the completion of said contract commenced to run November 20, 1944. That all progress payments and all payments under the entire contract were made by the United States government to defendant, Pat Duby, subsequent to December 1, 1944. That from the last and final payment made by the government to defendant, Pat Duby, the government deducted in partial satisfaction of its claim for liquidated damages the sum of \$979.82.

X.

That because of the difficulties encountered in the performance of the said contract the said defendant, Pat Duby, expended in excess of \$17,000 and in addition thereto the defendant, Continental Casualty Company, paid the full penalty of its payment bond into the registry of this court in an interpleader action in Cause No. 1294 to be pro rated among labor and material claims resulting from the performance of said Seattle-Tacoma Airport job.

XI.

That on the 30th day of June, 1945, H. L. Duby, doing business as Pat Duby Company, was adjudged a bankrupt in the United States District Court for the Western District of Washington, Northern Division, in Cause No. 37366, according to the system of numbering bankruptcy causes in said court.

That within six weeks after the said adjudication of bankruptcy plaintiff herein had actual notice of the pendency of said bankruptcy proceeding and had full opportunity to participate in said bankruptcy proceeding and to assert any and all claims against the said bankrupt and particularly the claim asserted by the United States government in this case.

That on the 14th day of November, 1945, a formal decree was entered in the said bankruptcy proceeding discharging H. L. Duby, doing business as Pat Duby Company, in the manner and form as provided for in the Acts of Congress relating to Bankruptcy and the amendments thereto. That the said discharge in bankruptcy was regularly and properly pleaded herein and has been duly proven herein.

XII.

That defendant, Continental Casualty Company, had no notice of plaintiff's intended claim for liquidated damages resulting from delay in the performance of the contract by said Duby until receipt of letter dated September 11, 1946, from the General Accounting Office of the United States and therefore the said Continental Casualty Company had no opportunity to file a claim covering the government's claim for liquidated damages in the H. L. Duby bankruptcy proceeding.

Done in Open Court this 16th day of July, 1951.

/s/ JOHN C. BOWEN,
Judge.

From the foregoing Findings of Fact, the court does make the following:

Conclusions of Law

I.

That under the laws and decisions of the United States the plaintiff's claim is one for liquidated damages and not one for a mere penalty.

II.

That by virtue of Section 16 of the Bankruptcy Act, the discharge in bankruptcy of the defendant, H. L. Duby, does not constitute a discharge to Continental Casualty Company as surety upon the bond of the said H. L. Duby.

III.

That any and all claims asserted by the plaintiff herein against the defendant, Pat Duby, doing business as Pat Duby Company, were provable claims and discharged in bankruptcy proceedings in the United States District Court for the Western District of Washington, Northern Division, No. 37366, and that the said defendant, Pat Duby, is entitled to entry of a decree of dismissal herein with prejudice and without costs.

IV.

That defendant, Continental Casualty Company, is entitled to the entry of a decree of dismissal herein with prejudice and without costs based upon the evidence produced in this case which constitutes a complete defense to said defendant under the allegations set forth in its Third Affirmative Defense as pleaded herein on the ground that all the while the United States was claiming the accrual of liquidated damages by reason of the delay in the performance of said contract by defendant Duby, the said plaintiff government continued to make progress payments to the defendant Duby to the prejudice and detriment of the surety, Continental Casualty Company, which funds the plaintiff government could have and should have applied in reduction of its claim for liquidated damages and as a result of the government's failure to so withhold said funds the surety is released of its obligations under its performance bond.

V.

That plaintiff take nothing by its complaint either against defendant H. L. Duby or against Continental Casualty Company, and plaintiff's complaint be dismissed with prejudice and without costs and each party hereto shall pay its own costs.

Done in Open Court this 16th day of July, 1951.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

/s/ WILLARD E. SKEEL,
Of Attorneys for Defendant, Continental Casualty
Company.

Approved as to Form:

/s/ HENRY W. PARROTT,
Attorney for Pat Duby.

/s/ J. CHARLES DENNIS,
/s/ JOHN E. BELCHER,
Attorneys for Plaintiff.

[Endorsed]: Filed July 16, 1951.

In the United States District Court for the Western
District of Washington, Northern Division

No. 2211

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PAT DUBY, Doing Business as Pat Duby Com-
pany, and CONTINENTAL CASUALTY
COMPANY, a Corporation,

Defendants.

JUDGMENT OF DISMISSAL

This cause having come on for trial before the undersigned, the Honorable John C. Bowen, senior judge of the United States District Court, Western District of Washington, Northern Division, sitting without a jury on the 24th day of April, 1951; plaintiff, United States of America, being represented by John E. Belcher, Assistant United States Attorney, and the defendant, Pat Duby, being present in court and represented by his attorney of record, Henry Parrott, and the defendant, Continental Casualty Company, being represented by its attorney of record, Willard E. Skeel; and all parties having announced that they were ready for trial, and the court being possessed of jurisdiction of the cause and evidence and testimony having been adduced on behalf of all parties, and said cause not being concluded on that day was continued for the purposes of completing the testimony

and trial of said cause to May 1, 1951, and from that date until May 25, 1951, at 2:00 o'clock p.m., at which time the testimony was completed and final argument made for and on behalf of all parties; and the court at the conclusion of the said final argument, wishing counsel to submit additional or supplemental briefs and to argue the matter further, the same was continued for the purpose of preparing and filing such supplemental briefs to June 11, 1951, and at said time such supplemental briefs having been filed and an additional argument made and presented on behalf of all parties; and the court having considered the evidence and law in the case did at such time render its oral decision against the plaintiff in favor of both defendants and having heretofore made and entered its Findings of Fact and Conclusions of Law, it is hereby

Ordered, Adjudged and Decreed that plaintiff herein take nothing by its complaint and that said complaint be and the same is hereby dismissed with prejudice and without costs. That each party shall pay its own costs herein.

Done in Open Court this 16th day of July, 1951.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

/s/ WILLARD E. SKEEL,
Of Attorneys for Defendant, Continental Casualty
Company.

Approved as to Form:

/s/ HENRY W. PARROTT,
Attorney for Pat Duby.

/s/ J. CHARLES DENNIS,

/s/ JOHN E. BELCHER,
Attorneys for Plaintiff.

[Endorsed]: Filed July 16, 1951.

Entered July 17, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Pat Duby, doing business as Pat Duby Company,
and Continental Casualty Company, a corpora-
tion, defendants herein, and

To Henry Parrott, attorney for Pat Duby, and
Skeel, McKelvy, Henke, Evenson & Uhlmann,
attorneys for Continental Casualty Company:

Notice is hereby given that the United States of
America, plaintiff above named, hereby appeals to
the United States Court of Appeals for the Ninth
Circuit from the Judgment of Dismissal entered in
the above court on the 16th day of July, 1951.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Assistant United States
Attorney.

[Endorsed]: Filed September 11, 1951.

[Title of District Court and Cause.]

ORDER TO TRANSMIT ALL EXHIBITS
TO COURT OF APPEALS

Upon the oral application of the United States Attorney, it is

Ordered that the Clerk of this Court transmit to the Clerk of the Court of Appeals for the Ninth Circuit all exhibits as part of the record on appeal herein.

Done in Open Court this 15th day of October, 1951.

/s/ JOHN C. BOWEN,
United States District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 15, 1951.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 2211

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PAT DUBY, Doing Business as Pat Duby Com-
pany, and CONTINENTAL CASUALTY
COMPANY, a Corporation,

Defendants.

Before: The Honorable John C. Bowen,
District Judge.

TRANSCRIPT OF PROCEEDINGS
AT TRIAL

April 24, 1951, 10:00 A.M.

Appearances:

J. CHARLES DENNIS,
United States Attorney, and

JOHN E. BELCHER,
Assistant United States Attorney,
Appeared for the Plaintiff.

HENRY W. PARROTT

Appeared for Defendant, Pat Duby.

WILLARD E. SKEEL,

of Skeel, McKelvy, Henke, Evenson &
Uhlmann,

Appeared for Defendant, Continental
Casualty Company.

Whereupon, opening statements having been made by counsel for plaintiff and counsel for defendant Continental Casualty Company, the following proceedings were had and done, to wit:

FRED WILD

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Belcher:

Q. Will you state your name, please?

A. Fred Wild. [2*]

Q. What is your business, Mr. Wild?

A. I am with the Civil Aeronautics Administration as a planning engineer.

Q. And during the year 1944-1945, what was your occupation?

A. I was assistant chief of the engineering unit for the Civil Aeronautics Administration.

Q. Are you familiar with the project at the Tacoma-Seattle Airport? A. Yes, I am.

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Fred Wild.)

(Call for bids marked Plaintiff's Exhibit 1 for identification.)

(Drawings marked Plaintiff's Exhibit 2 for identification.)

The Court: Can one of counsel, agreeably to other counsel in the case, attribute to Plaintiff's Exhibit 1 a name that reflects the character of the information in it?

Mr. Skeel: It appears to be a call for bids, your Honor.

Q. You have been handed what has been marked for identification Plaintiff's Exhibit 1? Did you ever see that before? A. Yes, I have.

Q. By whom was it prepared?

A. By the Civil Aeronautics Administration. [3]

Q. What is it?

A. It is the call for bids for this particular job.

The Court: Whose call for bids?

The Witness: The Civil Aeronautics Administration.

Q. For what project?

A. For the construction of three check dams and a barrel culvert for drainage purposes south of the Seattle-Tacoma Airport.

Q. State whether or not a copy of that call for bids was sent to Mr. Pat Duby? A. It was.

Mr. Skeel: If you know, Mr. Wild.

The Court: Do not give an answer unless you personally know the answer.

The Witness: Yes.

(Testimony of Fred Wild.)

The Court: Do you know that answer of your own information?

The Witness: Yes, I do.

Mr. Belcher: I want to offer this exhibit at this time.

Mr. Skeel: No objection, your Honor.

The Court: Plaintiff's Exhibit 1 is now admitted.

(Plaintiff's Exhibit 1 received in evidence.)

Q. At the time that the call for bids was delivered to [4] Mr. Duby, was anything else delivered to him?

A. The plans that you have there and the standard contract conditions which he examines that becomes a part of the contract upon acceptance.

The Court: Let the witness have the exhibit, if there is any, that the witness' last statement referred to. The clerk advised me what has been marked Plaintiff's Exhibit 2 consists of several parts. The clerk will take one part and give to that a subnumber 2(a) and then to each and every other part give another subnumber; for instance, let the next part be numbered 2(b), etc. Read the question.

(Last question read by reporter.)

The Court: Your answer should be yes or no.

The Witness: No.

The Court: Nothing else was delivered to him at that time, is that right?

The Witness: That is right.

(Testimony of Fred Wild.)

Q. At a subsequent time, was anything further delivered to him? A. Not that I know of.

Q. When, if at all, were the documents which are before you now, marked for identification Plaintiff's Exhibits 2(a), (b) and (c), delivered to Mr. Duby?

A. They were all delivered at the same time that the [5] invitation, the bids, were sent out to prospective bidders.

The Court: Does the word "invitation" have the same meaning and is that what you have referred to formerly as a call for bids?

The Witness: Yes, your Honor.

Q. If I understand you correctly, they were delivered to Mr. Duby at the time the call for bids was delivered? A. That is right.

Mr. Belcher: I desire to offer these in evidence.

Mr. Skeel: No objection, your Honor.

The Court: Plaintiff's Exhibit 2, in three parts, described as (a), (b) and (c), is and are now admitted.

(Plaintiff's Exhibits 2 (a), (b) and (c) received in evidence.)

Q. What was the bid that was made, in round figures, made by Mr. Duby for this work?

The Court: If he made a bid.

Q. If he made a bid?

A. \$6,512.70 on this schedule.

Q. Previously had there been an engineer's estimate made as to what this project would cost, by the Civil Aeronautics Administration?

(Testimony of Fred Wild.)

A. Yes.

Q. How did that estimate compare with the bids made by Mr. Duby? [6]

A. It was slightly over \$100 more.

(Contract marked Plaintiff's Exhibit 3 for identification.)

Mr. Skeel: Might I inquire is this all going in as one exhibit, because there are several different documents.

Mr. Belcher: Yes.

Mr. Skeel: No objection to Exhibit 3.

The Court: Do you offer Exhibit 3?

Mr. Belcher: I offer Exhibit 3.

The Court: It is now admitted.

(Plaintiff's Exhibit 3 received in evidence.)

Q. Will you state what that is?

A. It is the contract covering this job.

Q. And it contains what?

A. It contains the contract face sheet which bears the acceptance of the Government on it. It contains the standard contract conditions, which has been signed by both the Government representative and, apparently, the contractor. It contains the performance bond signed by the contractor and the Continental Casualty Company, and an unsigned, unfilled-in certificate as to corporate principal, and a payment bond signed by the Continental Casualty Company and Mr. Duby, and the copy, similar copy of the invitation to [7] bidders incorporated in the

(Testimony of Fred Wild.)

formal contract, apparently. And there is a modification letter in here which modifies one of the drawings, and a list of specifications and drawings applicable, and the schedule of minimum wage rates to be paid, and a list of special equipment to be furnished by the Government, and the schedule of items to be performed under the contract, and attached to that is the form that covers the quotation solicited from various contractors and the prices they offered. That is the essence of these enclosures.

(Copy of letter of 4-4-45 marked Plaintiff's Exhibit 4 for identification.)

Mr. Skeel: No objection.

Q. You have been handed what has been marked for identification Plaintiff's Exhibit 4. Did you ever see that before? A. Yes, I have.

Q. What is it?

A. It is a letter to Pat Duby Company from our administrative officer extending 16 more days for additional work.

Mr. Belcher: I want to offer that in evidence.

The Court: What is the date of the letter?

The Witness: April 4, 1945.

The Court: It is admitted.

(Plaintiff's Exhibit 4 received in [8] evidence.)

Q. So far as you know, was any advice as to the conditions, any unusual conditions, surrounding this work given to any of the bidders?

(Testimony of Fred Wild.)

Mr. Skeel: Just a minute, Mr. Wild. I don't think this witness has as yet been qualified to answer that question, your Honor. He hasn't stated that he is the engineer on the job. All he has stated is that he was the original planning engineer. As far as I know, he was never on the job.

Q. What position did you occupy with respect to this particular job?

A. At that time, in the capacity of assistant chief of the unit, I prepared these specifications.

Q. Did you have direct supervision of the work?

A. No, I did not. That was handled by the construction unit. We prepared the plans and made the survey and issued the call for bids.

Q. As assistant chief of the engineering unit, what were your duties?

A. To ascertain the needed work and to assist in the supervision and the preparation of these plans to see if they would meet the need.

Q. And as the work progressed, did you have any supervision over it?

A. Not other than to make examinations that might help [9] us in making changes. The changes were made in our office.

Q. Who was the engineer on the job?

A. Mr. Doyle Affleck was the engineer on the job.

Q. Was there anybody else assisting?

A. Mr. Lester Hall was his assistant resident engineer.

Q. Where is Mr. Hall now?

(Testimony of Fred Wild.)

A. Mr. Hall is in the courtroom.

Q. Is he still connected with the Civil Aeronautics Administration? A. He is not.

(Copy of letter of 10-4-44 and receipt of 10-6-44 marked Plaintiff's Exhibit 5 for identification.)

Mr. Skeel: No objection, your Honor.

Q. You have now been handed what has been marked for identification as Plaintiff's Exhibit 5. Will you state what it is, Mr. Wild?

A. It is a letter to the Pat Duby Company from our acting administrative officer, who refers to his quotation. Do you want me to——

Q. No. It is a notice to proceed, is that what it is?

A. Yes, it is a notice to proceed, in essence.

Q. In other words, when you enter into a contract of this type, your regulations or the law requires that you give the contractor written notice to proceed? [10] A. That is right.

Q. And that is for the purpose of fixing the time, is it—— A. That is right.

Q. ——as to when the contract is to be completed? What was the time limit for the work to be completed?

A. The original work to be completed was—the time was thirty days without that extension that was in here of sixteen days.

Q. And Exhibit 4 extended that time for an additional sixteen days? A. Sixteen days.

(Testimony of Fred Wild.)

Q. State, if you know, Mr. Wild, how long it did take the contractor to finish this job.

A. Other than—I don't know personally, other than from the correspondence.

Mr. Skeel: I will object to any answer that this individual gives, then. He was not personally on the job. He stated he did not know from his own personal knowledge.

Q. Mr. Wild, are you still employed in the Civil Aeronautics Administration? A. Yes.

Q. Are these records that you are testifying from records that are kept in the ordinary course of the work under the [11] Civil Aeronautics Administration? A. Yes, they are our official files.

Q. Are those records in your custody?

A. They are not in my office, no.

Q. Well, are they in your custody?

A. I have access to them.

Q. And they are records of——

The Court: Ask the witness. You started to make a statement.

Q. What are those records?

A. They are the official records covering the work, the project.

Q. State whether or not they are kept in the regular progress of the work? A. They are.

(Copies of letters marked Plaintiff's Exhibit 6 for identification.)

The Court: I got the impression from what was said by defendant's counsel that there was no ob-

(Testimony of Fred Wild.)

jection to Plaintiff's Exhibit 5, and I did not hear Mr. Belcher make an offer.

Mr. Belcher: I offer Plaintiff's Exhibit 5, your Honor.

The Court: Plaintiff's Exhibit 5 is now admitted.

(Plaintiff's Exhibit 5 received in [12] evidence.)

The Court: There has been marked for identification Plaintiff's Exhibit 6.

Mr. Skeel: What do these contain, Mr. Belcher?

Mr. Belcher: They contain the records of correspondence between Mr. Duby and the Continental Casualty Company pertaining to this particular contract, all of the correspondence.

Mr. Skeel: I have no objection, your Honor, to any letters written by Mr. Duby to the Government, or any letters written by Continental Casualty Company to the Government, or any letters from the Government to Continental Casualty Company, but any other letters I must object to on the ground that they are not properly placed in evidence here. They are purely self-serving records of the Government. We have no opportunity to cross-examine the persons writing the letters.

Mr. Belcher: It is not my purpose, if I might interrupt, counsel, to introduce from this file anything except correspondence between the Civil Aeronautics Authority, Mr. Duby and the Continental Casualty Company. Anything else I will have the witness withdraw from the file.

(Testimony of Fred Wild.)

The Court: The objection stated by Mr. Skeel would relate to letters from representatives of the plaintiff to Mr. Duby or the Duby defendant. Did you intend to—— [13]

Mr. Skeel: On behalf of Continental Casualty Company, I would object to any letters from the Civil Aeronautics Administration to Mr. Duby as not being in any way binding on Continental unless it is shown that copies went to Continental.

Mr. Belcher: I might say, if your Honor please, that I had all of these letters and documents that I intended to introduce in photostatic form. They came with black backgrounds. In other words, as Washington is wont to do, they sent the black background documents, which necessitated my having to invoke the aid of the Public Printing Office in the City of Seattle for the purpose of having them made positive copies.

Unfortunately, they were not able to get them and will not be able to get them until noon today, and all of these documents I have offered in evidence, with the exception of the maps, I am going to ask that I might substitute photostatic copies for them, because I do not want to disrupt the permanent records of the Civil Aeronautics Administration.

The Court: That can be attended to later. Read Mr. Skeel's last statement.

(Last statement of Mr. Skeel read by reporter.)

The Court: Do you wish to meet that with proof,

(Testimony of Fred Wild.)

or do you wish to withdraw any offer where that condition [14] stated by Mr. Skeel is not present or met, or what is your attitude?

Mr. Belcher: I would like to inquire of the witness if he knows in all correspondence that was had between Pat Duby and the Civil Aeronautics Authority, whether copies of that correspondence were sent to the Continental Casualty Company, the surety on his bond?

Mr. Skeel: If you know personally.

A. I do not know.

Q. You do not know?

A. I do not know.

Mr. Belcher: In that event, if your Honor please, I will have the witness withdraw from the file when it is handed to him, so far as the Continental Casualty Company is concerned, any correspondence with Pat Duby.

The Court: How are you going to withdraw it so far as Continental Casualty Company is concerned if you want it in so far as Pat Duby is concerned?

Mr. Belcher: I want it in as far as Pat Duby is concerned, and I will make a separate offer as to Pat Duby.

The Court: Is there any objection on the part of Pat Duby? Are you offering Plaintiff's Exhibit 6?

Mr. Belcher: If your Honor please, I think notice to Pat Duby is notice to his bonding company.

The Court: You are now changing your [15] previous statement of attitude?

(Testimony of Fred Wild.)

Mr. Belcher: Yes, your Honor, I think I am entitled to have these letters introduced in evidence.

Mr. Skeel: If your Honor please, notice to Mr. Duby is not notice to his bonding company. They are separate concerns entirely. The letters themselves do not show that copies went to Continental Casualty Company, and I am informed by the administrative officers of Continental Casualty Company that as a matter of fact they did not receive those letters. They did receive some letters, and any letters that were sent to Continental by the Civil Aeronautics Administration, I have no objection to.

The Court: If the letter was written to the principal contractor who was the principal on the surety bond in the ordinary course of the contract work and did not involve some express waiver of risks, waiver which involved additional risks of the surety, the Court would suppose, in the absence of counsel showing the Court some statement of authority to the contrary, that the admission in evidence generally of the document would not depend upon a copy being sent to the surety. The surety did not by becoming surety on the bond become entitled to be regarded as a third party to the acts of the parties on the contract.

If counsel for Continental Casualty Company has some [16] authority for his position, I would ask him to let me see that before I finally rule upon it. In making the statement I have just made, I would not wish any part of it to refer to an instance where

(Testimony of Fred Wild.)

there was a question of an extension of time or a modification or amendment of the contract or anything relating to an increase in the amount of the work, or in giving up or in releasing the contractor principal on the surety bond from some obligation under the contract or doing something that added to his obligation or increased his obligation, thereby incidentally increasing the risk of the surety.

I am not speaking of those situations, but so far as concerning the course of the work is concerned, the dealings of the parties in connection with the work, I would think, in the absence of a statement from counsel of authority to the contrary, that the objection should not be well taken.

Mr. Skeel: I do not have such authority, your Honor. The theory of my objection to that is in connection with our third affirmative defense, and that is the principal reason I gave my opening statement at the time I did rather than reserve it, so that the Court would understand what Continental Casualty Company was getting at.

We claim and maintain, as set forth in our third affirmative defense, that we have had no notice of any [17] kind of any claim by the Government for penalty or liquidated damages at the rate of \$20 per day that the Government was making until approximately a year or a year and a half after completion and acceptance of the contract. It is true that there are in the files which Mr. Belcher is asking to be admitted correspondence between the Government and Mr. Duby in connection with

(Testimony of Fred Wild.)

the difficulties that he was having and in connection with his various and sundry requests for extension of time, but I still maintain that Continental at no time was ever advised that the Government was making any claim for this \$2,600 or any other sum for liquidated damages.

Our third affirmative defense is partially based on estoppel, and I feel that to allow correspondence between the Government and Mr. Duby which Continental Casualty Company never had any notice or knowledge of is, in effect, to jeopardize and tear down without our consent or knowledge the effect of our third affirmative defense.

The Court: Insofar as that objection is concerned, the Court overrules that objection, and I say to counsel and all the parties in the case that if you can convince me by a showing of authority before the Court makes a decision on the merits that this ruling is wrong, the Court will modify this ruling to the extent and in the [18] respect in which you convince the Court later that the Court is wrong; but I wish to say to all that my statements in this connection do not relate to any particular situation, if there is any, where the Government expressly by some new act either gave to the defendant Pat Duby some advantage or took away from him some advantage that increased in any way the surety's risk or took away any rights which the surety had against its insured. Is that clear?

Mr. Skeel: Yes, your Honor.

(Testimony of Fred Wild.)

Mr. Belcher: That is clear.

Mr. Skeel: Perhaps under your ruling the letters should be handled piecemeal, or some better method devised, because we have a group here of I do not know how many letters.

Mr. Belcher: May I suggest, if your Honor please, I think I can simplify this by taking out of this file—I didn't want to disrupt it if I could help it.

Mr. Skeel: Mr. Belcher, I have some photostatic copies of those if you would prefer to use them.

Mr. Belcher: May we take a moment, your Honor? I think it will save time in the long run.

The Court: You may do that.

Mr. Belcher: I think we can save considerable time, your Honor. [19]

Mr. Skeel: I have no objection to that group.

Mr. Belcher: May I have these three documents marked?

The Court: Let them keep the mark they already have, and if there is something else besides that, let something else have another mark.

Mr. Belcher: That is satisfactory. These exhibits, if your Honor please, are being offered as to the Continental Casualty Company.

Mr. Parrott: If your Honor please, among the various items in this Exhibit 6 that we have been disassembling and checking there is one letter that defendant Pat Duby would presently ask and demand that it be made available here as a part of

(Testimony of Fred Wild.)

the evidence to be introduced on behalf of the defendant Pat Duby. The letter in question is——

The Court: I would think it would be much more certain and definite if you would withhold this statement until counsel for the Government makes some definite reference to it.

Mr. Parrott: He is not going to make any reference to it. It is one of the items that has been eliminated.

The Court: Will you wait a moment? Then I will give you an opportunity to complete your statement. Mr. Clerk, have you back in your hands that portion of the file which you previously identified as Plaintiff's [20] Exhibit 6?

Mr. Belcher: He has eliminated the marks.

The Court: Let all of that file be returned to Mr. Belcher. There is now in the Clerk's hands Plaintiff's Exhibit 6, which is a substitute exhibit for the one previously so marked. It consists of how many sheets of paper?

Mr. Belcher: Three letters, your Honor.

The Court: What is now Plaintiff's Exhibit 6 consists of three sheets of paper. Two of them are on the letterheads of Continental Casualty Company, and one of them is what purports to be a carbon copy of a letter dated April 19, 1945, from D. S. Anderson, Chief, Contract and Service Branch, to Continental Casualty Company.

Q. (By Mr. Belcher): Mr. Wild, you have now been handed what has been marked for identifica-

(Testimony of Fred Wild.)

tion as Plaintiff's Exhibit 6. Did you ever see those documents before? A. I have.

Q. They are part of the official records of the— what are they?

A. They are part of our official records, retained in our file of the project.

Mr. Belcher: I want to offer them in evidence.

Mr. Skeel: No objection, your Honor.

The Court: Is there any objection to this [21] offer?

Mr. Parrott: I have no objection.

The Court: Plaintiff's Exhibit 6 is now admitted.

(Plaintiff's Exhibit 6 received in evidence.)

The Court: Mr. Parrott, you may now make or complete your statement. The court reporter will read the statement made by you up to this time.

(Statement read by reporter as follows: "Mr. Parrott: If your Honor please, among the various items in this Exhibit 6 that we have been disassembling and checking there is one letter that defendant Pat Duby would presently ask and demand that it be made available here as a part of the evidence to be introduced on behalf of the defendant Pat Duby. The letter in question is"—)

The Court: Identify it.

Mr. Parrott: Is dated August 11, 1945, on the stationery of the Department of Commerce, Civil Aeronautics Administration, Washington 25, ad-

(Testimony of Fred Wild.)

dressed to the Regional Administrator, Seventh Region, Attention 7-170, signed by C. M. Estep, A-190, Contract and Service Officer. I would like at this time to have it offered in evidence on behalf of the defendant Pat Duby. It is out of order, maybe, at this time, but I would like to have it at least identified as an exhibit that will at [22] some time be offered on behalf of Pat Duby.

Mr. Belcher: The Government joins in the request.

The Court: Let it be marked Plaintiff's Exhibit 7.

(Letter of 8-11-45 marked Plaintiff's Exhibit 7 for identification.)

The Court: Do you, Mr. Skeel, object to what is now marked Plaintiff's Exhibit 7?

Mr. Skeel: I haven't seen it, your Honor.

Mr. Parrott: Defendant Duby's exhibit.

The Court: Mr. Belcher, do you wish to offer it along with Mr. Parrott?

Mr. Belcher: Yes, your Honor.

The Court: Let it be marked Plaintiff's Exhibit 7. I wish counsel would have in mind that the Court prefers to let counsel look at an exhibit or document for the purpose only of letting counsel make up his mind as quickly as possible whether he has any objection to it.

Mr. Parrott: There is no objection to it so far as defendant Duby is concerned.

The Court: Counsel will have a later opportunity of studying it in detail.

(Testimony of Fred Wild.)

(Certified copy of settlement marked Plaintiff's Exhibit 8 for identification.)

Mr. Skeel: On behalf of the Continental Casualty Company, your Honor, we feel that that letter is not binding or [23] representing any notice of the contents therein to Continental Casualty Company at that time.

The Court: Do you object to its admission?

Mr. Skeel: Since counsel for Mr. Duby wishes it in, I have no objection to it from his standpoint of the case, but I object to its in any way binding Continental Casualty Company with knowledge of its contents as of that time. For that limited purpose, with that exception, I have no objection to its entry.

The Court: Do you ask the Court to admit it without any reservation as to its being admissible against the defendant Continental?

Mr. Belcher: Yes, I do.

The Court: On what theory? It has not been established yet. Let the witness see it, if you think you can establish its authenticity by the witness. If you cannot, reserve your offer until you can establish its authenticity.

Mr. Skeel: I have no objection to its authenticity. I am not objecting on that ground. It is a letter from one agency of the Government to another agency, and I do not believe Mr. Belcher is offering it or claims that the contents of that letter were made known to Continental Casualty Com-

(Testimony of Fred Wild.)

pany. That is the only limitation of my [24] objection.

The Court: I understand you object to its being used as evidence against your client, Continental Casualty Company, is that true?

Mr. Skeel: That is correct.

The Court: Do you object to its being admitted in evidence against your client?

Mr. Skeel: Only insofar as Continental is not bound by the knowledge of its contents.

The Court: That is a distinction without a difference, so far as I am concerned, in determining its admissibility.

Mr. Belcher: I think it comes in under your Honor's former ruling.

The Court: The Court will not pass upon this, and give counsel an opportunity to establish its authenticity so that I can tell whether or not it should be admitted in evidence. Proceed.

Q. (By Mr. Belcher): Mr. Wild, you have been handed what has been marked for identification as Exhibit 7. State whether or not that constitutes part of the official files.

A. This is 7 that I have in front of me. Yes, it is.

Q. And in connection with what?

A. In connection with this particular project. It is from our Washington office to our regional office.

The Court: What is the identity of the paper or [25] exhibit referred to by the witness now?

(Testimony of Fred Wild.)

Mr. Belcher: It was Exhibit 7.

The Court: That has in it a certificate and black background photostat.

Q. (By Mr. Belcher): Did you ever see that document before? A. Yes, I have.

Q. Where did you see it?

A. In our official files with this case.

The Court: You mean the plaintiff's official files?

The Witness: The Civil Aeronautics Administration's official files.

Q. Relating to what?

A. Relating to the Pat Duby Company construction job project.

Q. Is that the contract involved in this case?

A. That is.

Mr. Belcher: I want to offer what has been marked Exhibit 8, which is a certified copy.

The Court: I have not yet ruled upon 7. Let me see both 7 and 8.

Mr. Belcher: I offer 7.

The Court: Look at Exhibits 7 and 8 and see which one you are speaking of now.

Mr. Belcher: I do not think this needs any identification, if your Honor please. The statute—[26]

The Court: Let's finish the first one you mentioned.

Mr. Belcher: I offer No. 7.

Mr. Skeel: I renew my objection to 7, your Honor, on the further ground that, as I understand, your Honor's previous ruling was that notice to

(Testimony of Fred Wild.)

Duby might possibly be construed as notice to Continental Casualty Company. Plaintiff's Exhibit 7 is on the letterhead of the Civil Aeronautics Administration in Washington, D. C., to the Regional Administrator of the Civil Aeronautics Administration here in Seattle, doesn't purport ever to have been given either to Continental Casualty Company or to Mr. Duby, and therefore, on behalf of Continental Casualty Company, I object to its entry as against Continental only.

Mr. Parrott: On behalf of the Defendant Duby, we re-offer the Exhibit 7.

Mr. Belcher: No objection.

The Court: As tending to prove what issue?

Mr. Parrott: As tending to prove the Civil Aeronautics Authority had actual notice of the pendency of the bankruptcy proceedings.

The Court: Do you set up some defense relating——

Mr. Parrott: I do, if your Honor please.

The Court: What is the defense alleged in that connection? [27]

Mr. Parrott: The defense is that the United States of America had notice of the pendency of the bankruptcy proceedings.

Mr. Belcher: That would make no difference, your Honor, under the statute. The statute is very plain.

The Court: I understand you want it in, Mr. Parrott wants it in. Why are you objecting to it now?

(Testimony of Fred Wild.)

Mr. Belcher: I am not objecting to it.

The Court: Mr. Belcher, it is not clear in the Court's mind on what theory at this moment you offer an inter-office communication between offices of the plaintiff when you do not claim up to now, so far as I have heard, that the communication ever came to the attention of either the Defendant Duby or the Defendant Continental Casualty Company.

Mr. Belcher: I am just not objecting to counsel's offer. If he wants to offer it, I don't care to offer it.

The Court: The objection is overruled. Plaintiff's Exhibit 7 is admitted upon the offer of the Defendant Pat Duby.

(Plaintiff's Exhibit 7 received in evidence.)

Mr. Belcher: Now, if your Honor please, counsel both have examined what has been marked for identification as Plaintiff's Exhibit 8, being a certified copy of the [28] determination made by the General Accounting Office in connection with this contract. The witness has never seen this. This is a document that, I take it, under the statute is admissible without proof.

Mr. Skeel: I have no objection to it.

Mr. Parrott: No objection.

The Court: The Court does not admit it because it has a black photostat in it, and the Court declines to receive it on that basis. You may proceed to something else.

(Testimony of Fred Wild.)

Mr. Belcher: You refuse admission on the ground that it is on black paper?

The Court: That is right. It is contrary to the Court's often-repeated rule in open court that the Court will not receive such.

Mr. Belcher: Your Honor will save an exception?

The Court: Allowed.

Q. (By Mr. Belcher): Counsel representing the Continental Casualty Company in his opening statement stated that the engineers for the Civil Aeronautics Authority ran test holes. What have you to say as to that, on this project?

A. I doubt that we did. There was no necessity for it, and we have none in our record, no record of it.

Q. Do you know, Mr. Wild, how long it was after you had served notice upon Mr. Duby to proceed with this work before [29] he actually commenced doing the work?

A. I do not know that.

Q. Do you recall writing any letter in October, 1944, to Mr. Duby in connection with the project?

A. A letter was written from our office.

(Photostatic copy of letter of 10-31-44, marked Plaintiff's Exhibit 9 for identification.)

Q. Did you ever see the original of what that purports to be?

A. I have seen copies of it, yes.

(Testimony of Fred Wild.)

Q. And that was a letter that was written in the ordinary course of business, was it?

A. That is right.

Q. And part of the official files of the Civil Aeronautics Administration? A. Yes.

Mr. Belcher: If your Honor please, I want to offer that.

The Court: Is there any objection?

Mr. Skeel: I would like to ask this witness a question or two.

The Court: You may do that, relating to admissibility.

Mr. Skeel: Who is Mr. Wilson, who appears to have written that letter?

The Witness: Mr. Wilson was our administrative [30] officer at that time.

Mr. Skeel: Where? Located here in Seattle?

The Witness: In Seattle for the Seventh Region of the Civil Aeronautics Administration.

Mr. Skeel: And you were working under his directions?

The Witness: He was in the contract and procurement group and he had charge of that office that took care of these particular matters.

Mr. Skeel: That is all the questions I have.

Mr. Belcher: If your Honor please, I offer the exhibit.

The Court: Have you any objection to the offer?

Mr. Skeel: No objection, your Honor.

The Court: Plaintiff's Exhibit 9 is now admitted.

(Testimony of Fred Wild.)

(Plaintiff's Exhibit 9 received in evidence.)

Mr. Belcher: If your Honor please, for the purpose of the witness refreshing his recollection, I take it I may hand him this file.

The Court: Is there any objection to counsel doing that? Let counsel see it.

Mr. Skeel: He may refresh his recollection from letters which he himself wrote, but I do not believe he can refresh his recollection from letters or documents made by other persons if he himself did not know about [31] it personally at the time.

Mr. Belcher: My purpose, if your Honor please, is to show that this file contains correspondence with the Defendant Pat Duby and with the Continental Casualty Company on this particular project, and that the witness will testify, as I understand it, that these are the records on this project kept in the ordinary course of business, of which he is at present the custodian, the records of which he is the custodian.

The Court: Do you intend to ask him if he during the progress of the work made any use of these files, or has made any use of them since, or what if anything he did do with reference to the information contained in the files?

Mr. Belcher: That is exactly what I intend to do, your Honor.

The Court: Complete the process of establishing your right to have this witness look at this file in case he gets into trouble with his memory.

(Testimony of Fred Wild.)

Mr. Belcher: It is for the purpose of refreshing his memory. Now, Mr. Wild——

The Court: There is objection to this witness using the file. Do you intend to try to establish by further evidence the right which you have to have the witness look at the file while he is testifying? [32]

Mr. Belcher: I want him to identify certain correspondence in that file as being correspondence——

The Court: If you want to do that, the file will have to be marked as an exhibit.

Mr. Belcher: Very well, your Honor. We will have it marked, if we might. The trouble is, I have disrupted the papers, your Honor.

The Court: Counsel has objected to certain things, and if you are going to try to lay a foundation that will enable you to make use of the file which you have announced your intention of making, and in the manner you last specified, then you are going to have to do something so that the Court can properly rule in this matter.

Mr. Belcher: In the interest of saving time, may I have the privilege of recalling this witness?

The Court: You may step down. Call the next witness.

Mr. Belcher: Mr. Hall.

LESTER HALL

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Belcher: [33]

Q. Will you state your name, please?

A. Lester G. Hall.

Q. What is your occupation?

A. I am now resident engineer of the Port of Seattle at the Seattle-Tacoma Airport.

Q. How long have you been in that position?

A. Approximately five years.

Q. Getting back to 1944, and the early part of 1945, by whom were you employed?

A. I was then employed by the Civil Aeronautics Administration.

Q. At Seattle? A. At Seattle, yes.

Q. And in what capacity?

A. I was assistant resident engineer at the Seattle-Tacoma Airport on the construction of the field.

Q. As such, were you familiar with this contract entered into by Pat Duby with the Civil Aeronautics Administration? A. Yes.

Q. Did you work on the project?

A. Yes.

Q. In what capacity?

A. Well, in general supervision.

Q. General supervision?

(Testimony of Lester Hall.)

A. For the Civil Aeronautics Administration, under the [34] resident engineer, who was Mr. Affleck.

Q. I will ask you if in your opinion, from your observation of the work that was being done by Mr. Duby, whether he prosecuted the work with ordinary energy?

Mr. Skeel: Just a minute. I will object to that, your Honor, as calling for a conclusion. This gentleman's opinion as to whether or not Mr. Duby was diligent or negligent, it seems to me, is not an issue in this case at all.

The Court: Do you make the point that there is in issue the question of the defendant's diligence and prosecution of work?

Mr. Belcher: Yes, your Honor. That is what this suit is about. He took 133 days when he was supposed to do it in 30 days.

The Court: You may have misspoken yourself, Mr. Skeel, but it appears to me your statement is not responsive to that situation.

Mr. Skeel: The manner in which Mr. Duby did it is in no way at issue here. Under the contract all we need to know is when he started and when the contract says he was supposed to finish and when he did actually finish, but not his manner or method of carrying on.

The Court: What allegation is there in plaintiff's complaint which tenders this issue? [35]

Mr. Belcher: Paragraph VI.

The Court: On page 2 of the complaint?

(Testimony of Lester Hall.)

Mr. Belcher: On page 2, where it is alleged that he contracted to do this work for \$6,602.70, "said work to commence within five calendar days after date of notice to proceed, to be completed within thirty calendar days from that date, which time was subsequently extended an additional sixteen days." Now I am trying to show by this witness, if your Honor please, that he didn't use proper diligence.

The Court: Where in the answer is there any proper diligence issue raised? Do you allege that he did not do it on time? Is there any other allegation that he did not finish in time, or that he should have finished it earlier than the contract time, or is there any other statement that might raise the issue of due diligence?

Mr. Belcher: That paragraph, if your Honor please, according to my notes, is admitted by Pat Duby, and the answer of the Continental Casualty Company denies it.

The Court: Then would not the pertinent inquiry be whether or not the contract was finished within 46 days?

Mr. Belcher: I will ask him that question.

The Court: The objection is sustained.

Q. (By Mr. Belcher): Mr. Hall, was the contract completed in the 46 days from the date of the commencement of the work? [36] A. No.

Q. How many days were consumed in the completion of the work, if you know?

A. Some 170-some days.

Q. State whether or not any test holes were

(Testimony of Lester Hall.)

made prior to the awarding of this contract, if you know.

A. There were none made, to my knowledge.

Q. None made to your knowledge? Was there anything unusual about the conditions at the site where this project was to be performed that were not observable to the ordinary individual who looked at it?

A. No, not especially.

Q. It is alleged in the answer that they ran into quicksand. Do you know anything about that?

A. Some quicksand was encountered.

Q. Was that observable to one who would take the trouble to look and see before he entered upon the work?

A. I think so.

Q. Were you on the job every day?

A. Well, I won't say that I was at that job every day, but practically every day.

Q. Did you have an opportunity to observe the type of employees that were hired by Mr. Duby to do this work?

A. Yes.

Mr. Skeel: Just a minute. Your Honor, I will object [37] to that again. It doesn't make any difference whether he had good employees or bad employees. The only question in issue is whether under the terms of this contract they could collect the penalty once they proved the date of starting and the date of finishing.

Mr. Belcher: Will counsel agree as to the date with me, so that we can shorten this matter, as to the date the job was finished?

Mr. Skeel: No.

(Testimony of Lester Hall.)

Mr. Belcher: How about Mr. Duby?

The Court: At this point we will take the noon recess, and you can be deciding about that. Perhaps you can on further consideration shorten the trial by some such admission as to facts which you know the plaintiff can prove, if there are any such. I will say to those connected with this case that I will have to suspend this trial today if it is not finished today, and I will have to suspend it until next week.

Today is the last courtroom work that I can do this week except Friday, and that is filled. The other two days I expect to use in finishing the moving of my office, which I have been trying to find an opportunity to complete for several weeks, and the time has come when I must finish that particular job, which is over and above the courtroom work, so that I can thereafter resume [38] the courtroom work uninterrupted by any moving job. I regret the possibility of the interruption, but I thought I should at this time advise counsel of the fact that tomorrow and the next day I will not be available for courtroom work, and on Friday I have the courtroom time schedule filled, it seems to me now.

Mr. Skeel: We will make every effort to finish today, your Honor.

Mr. Belcher: I am just about through, your Honor.

The Court: All those connected with this case are excused until 2:00 o'clock and may now retire. Court is recessed until 1:45.

(At 12:02 o'clock p.m., Tuesday, April 24, 1951, proceedings recessed until 2:00 o'clock p.m., Tuesday, April 24, 1951.)

April 24, 1951—2:00 P.M.

The Court: If there are no other matters to come before the Court, you may resume the trial proceedings in the Duby case. The Witness Hall has resumed the stand for further examination. You may proceed.

Q. (By Mr. Belcher): Mr. Hall, as supervising engineer on this project, will you state when the work was started and [39] when it was completed?

A. It was started October 6, 1944, as I recall, and completed about the first of April in 1945.

Q. You don't know the exact date?

A. Not from memory I don't, no.

Q. From any records that you personally kept, Mr. Hall, is it possible for you to examine the files and determine those dates?

A. Well, they would be in the official files of the Government.

Q. Did you personally write any letters to Mr. Duby during the progress of the work?

A. Yes, I did.

(Copy of letter of 3-5-45, marked Plaintiff's Exhibit 10 for identification.)

Q. You are being handed what has been marked for identification as Plaintiff's Exhibit 10. Did you ever see that before? A. Yes.

(Testimony of Lester Hall.)

Q. What is it?

A. It is a letter I wrote to Pat Duby on March 5, 1945, regarding——

Q. What did it have reference to, Mr. Hall?

A. The status of the job at that time.

Q. What is the date of the letter? [40]

A. March 5, 1945.

Mr. Belcher: I want to offer that in evidence.

Mr. Skeel: My only objection, if the Court please, is that there was no knowledge or notice of that letter directed to Continental Casualty Company.

The Court: The objection is overruled. Plaintiff's Exhibit 10 is now admitted.

(Plaintiff's Exhibit 10 received in evidence.)

The Court: All of these rulings which are on that point that is raised by that objection, Mr. Skeel, are subject to later correction if you can later before the Court announces its decision convince me that the ruling is wrong, and I would welcome any authorities which you may wish to show me in support of your position.

Mr. Belcher: You may inquire.

Cross-Examination

By Mr. Skeel:

Q. I understood you to say, Mr. Hall, that you were the assistant resident engineer at Bow Lake during the construction of this particular contract, is that right? A. Yes.

(Testimony of Lester Hall.)

Q. And you were there from the commencement of the work in the summer of 1944, from the time of the call for bids? A. Yes. [41]

Q. Until the completion of the job?

A. Yes.

Q. And you were out there almost every day watching and supervising, were you?

A. Yes.

Q. Did you also have anything to do with supervising or engineering the principal contract in the leveling, grading and paving of the runways for the Bow Lake Airport? A. Yes.

Q. Was that job going on at the same time?

A. Just prior to the time of Duby's contract.

Q. That other contract started just prior?

A. No, it was completed, I think, just prior.

Q. It was completed prior to the commencement of Mr. Duby's? A. Yes.

Q. Did you have anything to do with the construction of the buildings at the Bow Lake Airport? A. Yes, sir.

Q. Was that going on at the same time?

A. No, the buildings at the airport were built not under the CAA.

Q. So you had nothing to do with that job, then?

A. Yes, I did have, but I was employed at that time with the Port of Seattle. [42]

Q. When was that time?

A. Starting about three years ago.

Q. In other words, more than a year after the completion of Mr. Duby's contract? A. Yes.

(Testimony of Lester Hall.)

Q. You were familiar with Mr. Duby's contract, were you? A. Yes.

Q. Did that contract call for Mr. Duby to resurface the roads? A. Yes.

Q. What was the answer? A. Yes.

Q. You can point that out, can you, in the contract?

A. I don't have the contract here now.

Q. It is in evidence as Exhibit 3.

A. Do you wish me to read it?

The Court: You do not wish him to read out loud, do you?

Mr. Skeel: No.

Q. If you have found the place, just answer me whether or not it does provide that Mr. Duby shall resurface the roads. A. Yes, it does.

Q. Were you in the party who went out to Bow Lake Airport with the prospective bidders just prior to the call for bids or at the time of the call for bids? [43]

A. I was out at the site available that day to show prospective bidders.

Q. Did Mr. Duby have a talk with you that day?

A. I don't recall.

Q. Was there anything out there that day that indicated to you that this contract would be anything but normal?

A. No, not under the general conditions that were there.

Q. Do you recall the time of year that you were out there in which prospective bidders were directed

(Testimony of Lester Hall.)

to come out and look over the site? Do you recall the time of year when that was? A. I do.

Q. When was it? A. Early October.

Q. Wasn't it in the summertime?

A. Or maybe the latter part of September.

Q. Wasn't it back in August?

A. Well, it was probably a month before the opening of bids.

Q. You say "probably." You don't recall the date?

A. I don't recall the exact date, no.

Q. Or even the time of year?

A. Well, I recall, yes, that it was in the latter part of summer or early fall.

Q. What was the condition of the site of the projected [44] work at that time in late August or early September, the time we have just been referring to, as to amount of water on the site?

A. Oh, there was very little water flowing down the stream channel at that time.

Q. Coming right down the site was a small stream, was there not? A. Yes.

Q. And that was almost dry and was carrying very little water? A. That is correct.

Q. Did you know at that time that there was a substantial amount of quicksand under the surface of the earth? A. No.

Q. Did you know at that time that there were subterranean springs and streams that were not on the surface? A. I assumed that there was.

(Testimony of Lester Hall.)

Q. Did you advise the prospective bidders that there were subterranean springs?

A. I did not.

Q. You did not so advise them? A. No.

Q. There was a change order, I believe is the correct name for it, I may be in error, a change order or modification order directing Mr. Duby as the contractor to perform [45] some extra work, was there not? A. Yes.

Q. Do you recall the date of that change order?

A. I think it was November 4th.

Q. That is the date it bears, yes. Do you remember on what date it was delivered to Mr. Duby?

A. No, I don't know that.

Q. Would you deny Mr. Duby's statement that that change order was handed to him on December 15, 1944, almost a month and a half after the date it bore? A. No, I wouldn't deny it.

Q. I didn't hear your answer.

A. I say I wouldn't deny that.

Q. Did the payments, the progress payments for Mr. Duby's work come through your office? Did you have any supervision or authority over those?

A. I had supervision over the preparing of the quantities and the submitting of the amount of work that had been done to date.

Q. Can you give me the dates and amounts of payments made to Mr. Duby under his contract?

A. No.

Q. It is true, is it not, Mr. Hall, that Mr. Duby's contract was substantially completed on January

(Testimony of Lester Hall.)

12, 1945, with the exception of filling in some rip rap and the cleanup [46] work?

A. No, I don't believe that is so.

Q. Is it not true that because of the heavy rains and mud condition and the quicksand prevailing there that Mr. Duby was unable to get his tractors into the site after January 12th and until the last part of March in order to perform that cleanup and leveling work?

A. I don't believe that he encountered any quicksand in his operations on the cleanup.

The Court: What form did that quicksand have? Can you describe its visual characteristics so that a lay mind would recognize its presence if a layman came upon the substance which you refer to as quicksand?

The Witness: Well, it is just like ordinary sand except that it is saturated with water and isn't stable.

The Court: Does it have any clay with it at all?

The Witness: It may or it may not. Generally not, though, I believe.

The Court: Was its water content the thing that made it troublesome, or would it have been troublesome if it had had no water content? Would it have been troublesome in these contract operations, if you know?

The Witness: No, I think the only time that it is unstable is when it has water with it. That is extremely hard to handle. [47]

Q. (By Mr. Skeel): The contract for the level-

(Testimony of Lester Hall.)

ing and paving of the Bow Lake Airport runways was in no way held up as a result of the delay of Mr. Duby in performing his contract, was it?

A. I would say no, not to my knowledge.

Q. Nor was the performance of any other contract in the Bow Lake area held up or delayed as a result of Mr. Duby's delay in the performance of his contract, is that a correct statement?

A. I don't believe any other contracts were affected by it.

Q. As a matter of fact, there was no actual damage of any kind or nature accrued to the United States Government as a result of Mr. Duby's delay in the performance of his contract?

Mr. Belcher: Objected to as immaterial. This is a suit on a contract which specifically provides that for each day's delay he shall pay a penalty of \$20.00. The question of damages doesn't enter into this question.

The Court: You mean the question of actual damages?

Mr. Belcher: Yes.

Mr. Skeel: I contend the law is the other way, your Honor, and I have pleaded it in both my first and second affirmative defenses, and I believe Mr. Duby has pleaded it likewise in one of his affirmative defenses, that no [48] actual damage of any kind or nature was sustained by the United States Government as a result of the delay in the performance by Mr. Duby of his contract.

Mr. Belcher: May I read the provision that is

(Testimony of Lester Hall.)

already in evidence, if your Honor please. The parties agree in this contract that liquidated damages in the amount of \$20.00 per day for each day's delay would be paid by the contractor. He is trying to vary the terms of that contract by trying to get the admission from this man that there weren't any damages. In the contract he is required to pay that amount for each day's delay, regardless of whether there was any substantial damage or not.

Mr. Parrott: I would like to urge, if your Honor please, that the question of whether this is a reasonable amount or not is a material question. The test in the cases seems to be that if the amount provided for is unconscionable it will be treated as a penalty and not as a measure of damages. This penalty claim amounts to 40-plus per cent of the amount of this contract, and our contention is that under that situation the Court is entitled to hear the facts, and that is the only way the facts can be developed, is by the progress of examination along the lines being followed by counsel. I submit, in order for the Court to determine that question, which is a judicial question to be determined by the Court, as to [49] whether or not this is an unreasonable, unconscionable penalty, that is the only way we can arrive at it.

Mr. Belcher: We are not called upon to meet that kind of issue under the pleadings, your Honor.

The Court: Both sides, as I understand, have said that the respective answers of the two defendants raise that issue.

(Testimony of Lester Hall.)

Mr. Belcher: We deny it. They simply say we didn't suffer any damages.

The Court: And the plaintiff denies that allegation?

Mr. Belcher: Yes.

The Court: Did the plaintiff ask the Court to strike the allegation or——

Mr. Belcher: I don't believe we did.

The Court: ——otherwise hold it improper?

Mr. Belcher: No, I don't think there was any motion made, but this is purely a suit upon this contract. It isn't a question as to the reasonableness or unreasonableness of this contract that they entered into. The contractor agreed that if he did not complete this job within the time specified in the contract—there are many reasons why the Government wants these things completed quickly, aside from the question of any special damages that might be incurred by reason of the fact that it was not completed by that time. [50]

The Court: I am going to overrule the objection to the offered proof, but in doing so I do not wish anyone connected with the case to understand that the Court does or does not at this time by implication or otherwise rule that this evidence tends to establish an adequate defense. It is merely because the pleadings are still before the Court raising this defense that the Court admits the evidence.

Q. (By Mr. Skeel): You may answer the question. Do you recall what it was? A. No.

Q. Will the reporter read it?

(Testimony of Lester Hall.)

(Last question read by reporter as follows:
“Q. As a matter of fact, there was no actual damage of any kind or nature accrued to the United States Government as a result of Mr. Duby’s delay in the performance of his contract?”)

A. That I do not know.

Mr. Belcher: Just a minute.

Q. Do you know of any actual damage?

Mr. Belcher: Just a minute, if the witness understands the question. That is a pretty broad term, any damage to the United States.

Mr. Skeel: Any actual damage.

Mr. Belcher: I object, if your Honor please. [51] Certainly under the terms of the contract the Government has been damaged at the rate of \$20.00 a day.

The Court: The objection is overruled. If the witness can answer the question, he may do so. I understood him to say he did not know the answer to the question,——

Mr. Belcher: Exception.

The Court: ——is that what you intended to say?

The Witness: That is right.

Q. (By Mr. Skeel): Do you know of any actual damage which accrued to the United States as a result of Mr. Duby’s delay in performance?

A. I can see where the Government was put to a considerable amount of expense.

(Testimony of Lester Hall.)

Q. Do you know of any actual damage which accrued to the Government as a result of the delay? If so, specify it.

A. I don't know of any damages.

Mr. Skeel: That is all the questions I have.

The Court: Does the Defendant Duby's counsel wish to ask any questions not covered already by Mr. Skeel's questions?

Q. (By Mr. Parrott): It might assist the Court, Mr. Hall, if you could say something about the distance this objective was from the airfield or airport proper. [52]

A. Oh, less than half a mile, I believe.

Q. It was, however, distinctly removed from any of the normal operations around that airport, was it not?

A. That depends on what you mean by normal operations.

Q. Well, what other operations were there in this interim of half a mile between the airport proper and this operation, if any?

A. This operation took the drain waters from the airport.

Q. I understand, but that is not what I asked you. I asked you what was there in the way of airport operations between the site of the building of these dams and the airfield where the other work was being carried on?

A. There were no flight operations, if that is what you have in mind.

Q. Were there any operations at all? This was

(Testimony of Lester Hall.)

a distinct operation about half a mile away from the airport proper, wasn't it? A. Yes.

Q. Would you want to testify that the amount of this contract was the reasonable cost of doing that job?

A. I don't believe I want to answer that.

Q. From what you saw of this job you say—how often were you there, by the way, from November until April 1?

A. I don't recall. I think I was there probably nearly every day that there was any construction operations taking [53] place.

Q. When did you first see any quicksand on there?

A. When they were excavating for the Bow Lake check dam.

Q. Who was the first one that saw any quicksand on there? A. I don't know.

Q. Were you the first one, do you think, or do you think somebody else discovered it? Was it reported to you by somebody? Did you go down there later and confirm it?

A. I don't recall that, either.

Q. How many times were you down there on this site before Mr. Duby was there?

A. I was there several times before I encountered Mr. Duby on the site.

Q. Did you see the quicksand before or after you first saw Mr. Duby?

A. It may have been the same time that I saw Mr. Duby for the first time.

(Testimony of Lester Hall.)

Q. But you saw Mr. Duby and saw the quicksand at a time when they were doing excavating work, was that right? A. That is right.

Q. How far underground was this quicksand at that time?

A. Oh, I suppose two or three feet.

Q. And that was the first time you saw it?

A. That is right.

Q. You said on your direct examination that Mr. Duby by [54] making a casual examination of the site should have detected the quicksand. Do you want to stand by that?

A. I don't believe I said he should have detected the quicksand.

Q. You indicated that you could have detected it, did you not?

A. No, I didn't intend to give that impression.

Q. Was there any way anybody could detect that quicksand prior to the time the excavation was made?

A. I believe what I said was with a reasonable examination of the site that a person should have been able to determine the unstable condition of the soil.

Q. Well, you said that quicksand was down three feet. What would a man have to do in order to find that quicksand if he is contemplating bidding on the job?

A. The quicksand was overlaid with other material that wasn't any more stable.

(Testimony of Lester Hall.)

Q. I said, what would he have to do? The quicksand was overlaid by other material?

A. That was as unstable as the quicksand itself, practically.

Q. Down about three feet the quicksand was, though? A. That is right.

Q. That was in the bed of the creek, wasn't it?

A. Yes. [55]

Q. There would be how much space across this gully? This construction was going on in a gully, wasn't it?

A. It was going on across an existing stream channel.

Q. How wide was the construction work crosswise of this channel? What was the length of the crosswise channel?

A. About ten feet, I believe.

Q. If a man had to go down three feet in the bottom of the creek to strike the quicksand, how far would he have to go down at the shoulders of this dam or the outer margins of it, the ends of it?

A. I think about a total of seven feet.

Q. You spoke about this subterranean water. When did you first observe the action of subterranean water? A. I suppose in 1943.

Q. You knew about it all the time, the way that water acted there, did you?

A. It was evident to anybody, I think.

Q. Answer my question. You knew about it all the time from 1943, for a year before this contract was let, is that it? A. Yes.

(Testimony of Lester Hall.)

Q. You knew these bids were being called for, didn't you? A. Yes.

Q. Did you say you prepared anything in connection with those bids, or the calling of those bids?

A. No. [56]

Q. What? A. No, I did not.

Q. You had nothing to do with it? A. No.

Q. Do you know anything about the paperwork in connection with this business, this job?

A. As it affected the job after it was let.

Q. Have you ever done any work of this kind, like installing dams like this job contemplated?

A. Well, very similar to this, yes.

The Court: Court will be at recess for about five minutes.

(Recess.)

The Court: You may resume the interrogation.

Q. Mr. Hall, you said you knew about this water condition in 1943? A. I think that early.

Q. Did you ever communicate that to anybody in the downtown office of the Civil Aeronautics Authority? A. I didn't.

Q. Did you ever communicate it to any bidder that was bidding on the job? A. No.

Q. Was there anything that a fellow of ordinary intelligence—that would be a notice to him that there was [57] anything of that nature if he was on the premises in August? A. Yes.

Q. What would it be?

(Testimony of Lester Hall.)

A. That there was more water at one place in the stream bed, considerably, than there was at other places.

Q. Where were those evidences?

A. Well, there was a great deal more water at 200th Street where the double box culvert was constructed than there was at the first check dam.

Q. And a fellow, if he went around, could see there was more water in one place than there was another? A. That is right.

Q. Do you think that would indicate to him a dangerous condition should be anticipated there or not?

A. It would indicate one that should be investigated, at least, I would think.

Q. The check dams on the culvert were completed about the 12th of January, weren't they, 1945?

A. I don't know when each unit of the job was finished.

Q. But you did raise the question that something should be done with the road and there should be some cleanup work? You raised that question, didn't you? A. Yes.

Q. And that wasn't completed until about the first of April, is that right? [58]

A. That is right.

Q. If the check dams and culvert, the physical construction by way of placing them on the premises, if they were completed by the 12th of December,

(Testimony of Lester Hall.)

1944, the maximum utility of that improvement so far as the Aeronautics Authority was concerned and so far as expediency in the operations incident to this work were effective, were they not?

A. If they were completed to that extent, but I wouldn't say that they were completed, because I don't recall.

Q. But they were completed a long time before the first of April, weren't they?

A. Yes, they were completed at least by the first of March or fourth of March, when I wrote that letter.

Q. You wrote the letter on the fourth of March and you know that they were completed before that time?

A. That is right.

Q. You said something about this road. Where is this road? Whose property is it on?

A. I think it is a King County road.

Q. It is a county road, isn't it?

A. That is right.

Q. There is no responsibility of the Civil Aeronautics Authority to keep that road up in any way, is there?

A. They had a responsibility to restore it to its original condition. [59]

Q. They felt that they should require the contractor to do that, didn't they? The Authority felt that, didn't they?

A. They had the obligation to restore it to its original condition, yes.

Q. That is, the contractor had that responsi-

(Testimony of Lester Hall.)

bility? Isn't it a fact that you could use the road practically all the time?

A. Well, it was usable.

Q. From the 12th of January on, it was possible for people wanting to use the road to pass over it, was it not?

A. I wouldn't know if it was that early or not.

Q. But you have no recollection of any time after the 12th of January, 1945, that the public couldn't use the road?

A. No, I don't have any specific recollection that they couldn't.

Mr. Parrott: I think that is all.

Mr. Belcher: That is all.

The Court: You may step down.

Mr. Belcher: Mr. Wild.

FRED WILD

recalled as a witness by and on behalf of plaintiff, having been previously duly sworn, was examined and testified as follows: [60]

Direct Examination

By Mr. Belcher:

Q. Mr. Wild, I think you testified, did you not, that you were the engineer that prepared the engineer's estimate on this work? A. Yes.

Q. And in preparing the estimate, was it necessary for you to familiarize yourself with the condi-

(Testimony of Fred Wild.)

tions that obtained out where the work was to be done? A. Generally speaking, yes.

Q. And did you do that?

A. I looked the site over. I walked over the site.

Q. What, if anything, did you find unusual about the site where the work was to be performed, if anything?

A. There was nothing unusual other than there was a natural drainage channel, nothing unusual but what you would find in a drainage channel, a slight amount of water flowing and I noticed there is a report in one of the exhibits I made, I believe, more water in some spots than others, and in walking down the center of the channel below 200th Street South, I believe it is, the stream bed was soft in spots. You would sink in slightly. I didn't know how deep that extended, however.

Q. For what flow of water were the culverts provided?

A. I want to refer myself to the plans, refresh myself [61] with the plans. I believe there are around 162 feet. The double barrel culvert had an approximate area, cross-sectional area under the road of 42 square feet.

Q. What does that indicate? What does that provide for, a considerable flow of water or just a small quantity?

A. Well, the structure was designed to take care of all of the drainage of the Seattle-Tacoma Airport.

(Testimony of Fred Wild.)

Q. When you sent out your call for bids or your proposal, I think you testified to, were the prospective bidders requested by you to examine the site?

A. They were requested to. We have a clause in the specifications and the invitation that advises bidders to acquaint themselves with conditions at the site.

Q. What has been your experience as to the custom prevailing in this part of the country where the Government calls for bids for certain construction work as to whether or not the contractor goes over the ground prior to making his bid?

Mr. Skeel: I will object to general evidence of custom in this area. It isn't pleaded. We admit Mr. Duby was out there and carefully looked over the site.

Mr. Belcher: That is all I wanted to show. The admission is made, that is all I need.

Q. (By Mr. Belcher): Now, Mr. Wild, can you state from your examination of the records in your possession as to when [62] the work was commenced and when it was finished?

A. The notice to proceed was effective November 6, if my memory serves me right, the records that we had up here, and the records would indicate that the work ended April 2, 1945. I don't know when the work actually started, I just know the date of the notice to proceed.

The Court: April 2, 1945, was the work cessation date?

The Witness: Yes.

(Testimony of Fred Wild.)

Q. Have you made any computation as to the amount of time consumed over and above the 46 days that you testified to as being the period in which the work should be completed?

A. I have personally not. I haven't actually made that computation myself.

Q. Can you do so?

A. I could from the records we have there, I believe.

Q. How many days over and above the 46 days?

A. Well, if those records are correct, there were 133 days over the 46, which would make 179 days.

The Court: 133, did you say?

The Witness: I believe that is what the record stated, our statement of facts we submitted to Washington.

The Court: 133 days in excess of the contract time?

The Witness: Yes, according to the record.

Q. Are you familiar with the provisions of this contract that was entered into by Mr. Duby with the Civil Aeronautics? [63] The contract itself made provision, did it not, by Article 9 for damages by reason of delay?

A. Yes, it is a standard clause.

Mr. Belcher: At this time I would like to read that provision of the contract, which has already been introduced in evidence.

The Court: As Plaintiff's Exhibit 3. You may now read it.

Mr. Belcher: Article 9. Delays—Damages. "If

(Testimony of Fred Wild.)

the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances and plant as may be on the site of the work and necessary therefor. If the [64] Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event it will be impossible to determine the actual damages for the delay and in lieu thereof the contractor shall pay to the Government as fixed, agreed and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: * * *"

Mr. Skeel: Mr. Belcher, you should read the proviso also.

Mr. Belcher: I will read the proviso. "Provided,

(Testimony of Fred Wild.)

That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning [65] of any such delay (unless the contracting officer, with the approval of the head of the department or his duly authorized representative, shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto."

Q. (By Mr. Belcher): Was there any complaint

(Testimony of Fred Wild.)

made to your knowledge to the Civil Aeronautics Authority about severe weather conditions?

A. I believe there was.

Q. And what, if any, decision was made by your proper administrative officers concerning those delays?

A. I believe Mr. Duby was requested to furnish the facts to us and I think we transmitted them to Washington by a statement of facts. [66]

Q. Was that in the nature of an appeal?

A. On whose part?

Q. As referred to in the contract?

A. Well, I wouldn't say. I would imagine it would be on Mr. Duby's part a request for relief.

Q. What, if you know, was the final decision of the Washington officials?

A. I don't know what Washington's final decision was.

Q. Is there anything in this file from which you can refresh your recollection as to what decision was made by the officials in Washington?

A. There may be. I don't know of them right now. I know of our regional recommendation, however.

Q. Do you know whether or not there appears in the records in your possession of this job, which took place some five or six years ago, as to whether or not your office referred the matter to the General Accounting Office?

A. Well, our Washington office would have done that, yes.

(Testimony of Fred Wild.)

Q. And the fact, if it is a fact, that the General Accounting Office communicated with Mr. Duby with reference to it would indicate what?

A. Well, it would not be settled, I would assume. That is an assumption on my part, however.

Mr. Belcher: I think you may inquire. [67]

Cross-Examination

By Mr. Skeel:

Q. Mr. Wild, there was a change order put through, was there not, requesting Mr. Duby to perform other and additional work than called for by the contract? A. That is right.

Q. And that change order was dated when?

A. The change order was dated, I believe it was November 4th.

Q. That is my understanding of the date of it. Now, do you know what date that change order was actually given to Mr. Duby?

A. I don't know that.

Q. Would you deny that it was given to him on any date other than December 15, 1944?

A. I would be prone to doubt that.

Q. Would you deny it?

A. I would not deny it, no.

Q. As a matter of fact, Mr. Duby was continually asking for extensions of time and for extra compensation because of all of the difficulties that he ran into, was he not? A. Yes.

Q. And he started asking for those extensions of

(Testimony of Fred Wild.)

time late in November or early December, did he not? A. Very possible. [68]

Q. As a matter of fact, no extension of time was ever given to him at all except in connection with the Change Order No. 1 which required him to do some other and additional work, is that correct?

A. That is right.

Q. So that no extension of time was ever given to him for the performance of his regular contract?

A. I would interpret that he would have 46 days to finish his regular contract also; that is, the 16 days additional allowed him by the equalization order would also be extended to cover any other work he had.

Q. Yes, but the 16 days extension of time was given in connection with the additional work?

A. That is right.

Q. Were you familiar with the difficulties and troubles Mr. Duby was having out there?

A. Yes, I did know of them to some extent.

Q. You were out to the work from time to time, or every other day or so?

A. No, sir, I was out there just occasionally. As I mentioned before, I am with the—I was with the engineering unit and the engineering phase was over, more or less, and it was under construction at the time, more or less as an observer.

Q. Did you know and hear about it when he struck all [69] this difficulty with the quicksand?

A. I heard of that, yes.

(Testimony of Fred Wild.)

Q. And when his equipment got bogged down so that he couldn't move it around?

A. Not at the specific time, I couldn't say what particular date I heard of it, but I knew of it at this time.

Q. Did you know that he had to hire clamshell equipment to stand by steadily so as to be able to haul tractors and other equipment out of the mud and quicksand?

A. I did not know that until I read the record.

Q. Do you know what the purpose of this change order was given for?

A. I believe it was for extra grading.

Q. Did you know that Mr. Duby was constantly asking permission to start his excavations at the lower end of the drainage canal rather than at the upper end so that he wouldn't have to fight the water all the way?

A. I did not know that. It wouldn't concern us.

Q. And that request was never granted to your knowledge, was it?

A. No, I don't know.

Q. I believe you testified that the contract granted to Mr. Duby was \$6602.70?

A. I believe that was the basic contract.

Q. Did you know or did anyone tell you that at the time [70] Mr. Duby finished completion of that contract he expended \$17,687?

A. I did not know that until a few days ago.

Q. A few days ago you were reviewing the file?

A. Reviewing the file.

(Testimony of Fred Wild.)

Q. And found Mr. Duby's letters so advising?

A. Of the extra expense.

Q. And Mr. Duby's letters setting forth his requests for time and requests for additional compensation?

A. I remember that more or less at the time it happened, but I did not remember seeing the figures before.

Q. Were you advised that there were considerable unpaid labor and material men in connection with that job? A. No.

Q. Or were you advised that Continental Casualty Company on their payment bond paid the full amount of that bond into this court?

A. No.

Q. Did you have anything to do with the planning of the grading and paving of the runways of Bow Lake Airport? A. Yes, I did.

Q. I will ask you if the delay in the performance of Mr. Duby's contract in any way delayed the performance of that leveling and paving of the runways?

A. It was not connected in any way. [71]

Q. Not connected in any way? A. No.

Q. Do you know of any other contract or construction job that was delayed as a result of Mr. Duby's delay in the performance of his contract?

A. No other construction job that I know of.

Q. Do you know of any actual damages suffered by the United States Government resulting from Mr. Duby's delay?

(Testimony of Fred Wild.)

A. None other than the standby time of our inspection crew.

Mr. Skeel: That is all, your Honor.

Q. (By Mr. Parrott): Mr. Wild, are you familiar with the letter signed by C. M. Estep, Contract and Service Officer—it is identified as Exhibit No. 7—a letter dated August 11, 1945?

A. I read it this morning. I remember it from then, I believe.

Q. Is that the first time you ever saw the letter, to your recollection?

A. No, I have seen it before.

Q. Was that letter received in your office, according to your best judgment, within reasonable mailing time after August 11, 1945?

A. I do not know that. I do not know the date of that letter, either. [72]

Q. I am just giving you the date of the letter. As far as you know, is there any reason you know of why that letter would not have been received in the ordinary course of the mail?

A. I know of no reason.

Q. I would like you to read a portion of the letter? This letter discusses this check dam contract; and the last paragraph: "Under the circumstances, therefore, it is suggested that the contracting officer's statement of facts, together with all pertinent papers in the case, be forwarded through the usual channels to the General Accounting Office for settlement. For the information of the General Account-

(Testimony of Fred Wild.)

ing Office your letter of transmittal should indicate the name of the receiver, if known * * *

Will you please take that letter, and reading the letter in the light of your knowledge and experience in these transactions, tell us what that refers to?

A. That refers—the letter refers generally to this Pat Duby contract.

Q. Did you know that Mr. Duby was adjudged bankrupt?

A. I did not know that until very recently.

Q. You read that letter?

A. I read the letter, yes.

Q. But you personally didn't know about that time—in other words, I will state for your information Mr. Duby was [73] adjudged bankrupt on the 30th day of June, 1945, and this letter was written one month and eleven days thereafter. You can't refresh your recollection to an extent which will enable you to know what he was talking about when he was talking about presenting this account to a receiver?

A. The word "receiver" here, if I may say, might have been someone that was requesting payment for bills. As I read it now and with the light of the advice on bankruptcy, I see where it would be receiver in bankruptcy.

Q. So according to the trend and substance of that letter the Civil Aeronautics Authority were considering the question of their rights and presenting the matter of their claim to the receiver.

(Testimony of Fred Wild.)

That is the purport as far as you can see now of that letter, is it not? A. Yes.

Mr. Parrott: That is all.

Mr. Skeel: Just one other question.

Q. (By Mr. Skeel): Did Mr. Duby's progress payments go through your office?

A. No, they did not.

Q. Do you have any record of payments as made to him? A. I don't have any record, no.

Mr. Skeel: That is all. [74]

Mr. Belcher: I take it it will be admitted by both the defendants that neither the Civil Aeronautics Authority nor the United States of America filed any claim in the bankruptcy proceedings arising out of this contract?

Mr. Parrott: I don't think they did.

Mr. Skeel: I think that is true.

Mr. Parrott: But they did have actual notice of the pendency of the bankruptcy, that is what this letter develops.

Mr. Belcher: The bankruptcy file is here. I would like counsel to examine it and agree if he can that no such claim was filed.

Mr. Parrott: I will say there was no claim filed by the Civil Aeronautics Authority on account of this transaction.

Mr. Belcher: Or by anybody in its behalf.

The Court: I do not know yet what the agreement, if any, is. I heard two statements made by counsel and I didn't hear any final response, and I do not know what counsel intend to agree.

(Testimony of Fred Wild.)

Mr. Belcher: I think the gist of what we were talking about, if your Honor please——

The Court: If you wish a stipulation you should state what you wish stipulated and ask the other counsel [75] if he agrees to it.

Mr. Belcher: I understood him to say he agreed to it.

Mr. Parrott: Yes, I will agree that the Civil Aeronautics Authority never filed any claim in the bankruptcy proceedings involving Mr. Duby.

The Court: The last question was and that nobody else on behalf of the CAA did either. I believe that is what he said in his last question.

Mr. Parrott: I am satisfied that that is true, but I think I would prefer to examine the claim file. We have here what is generally known as the referee's court file, but we do not have the claim file.

The Court: How long will it take you to find out from the claim file?

Mr. Parrott: About five minutes.

The Court: Do you wish to submit a claim file to him, Mr. Belcher?

Mr. Belcher: Yes, your Honor.

The Court: You can do that at the next recess.

Mr. Belcher: I want to offer, if your Honor please, for your Honor's consideration the entire file in the bankruptcy proceedings No. 37366, together with the claim files, which are a separate file, according to the notes in the file.

The Court: Do you wish it marked? [76]

Mr. Belcher: Yes, if your Honor please, I do.

(Testimony of Fred Wild.)

(Bankruptcy file No. 37366 marked Plaintiff's Exhibit 11 for identification.)

Mr. Belcher: I want to offer that file.

The Court: Do you have any objection?

Mr. Skeel: I have no objection.

Mr. Parrott: No objection, if your Honor please.

The Court: Plaintiff's Exhibit 11 is now admitted.

(Plaintiff's Exhibit 11 received in evidence.)

The Court: Are all counsel agreed as to what it is? Will you state for the record what it is?

Mr. Belcher: It is the petition and all proceedings in the bankruptcy court and the discharge of the bankrupt as shown by the order made by this Court, together with all of the claims that were filed in the bankrupt estate.

Mr. Skeel: I do not believe the claims are in the file which the Court has.

Mr. Belcher: I have permission, if your Honor please, to supply the claims from the clerk's office in a few moments.

The Court: You may do that at your first opportunity.

Mr. Belcher: I understand counsel are through with cross-examination of this witness.

The Court: You may step down. Call plaintiff's next witness. [77]

PAT DUBY

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Belcher:

(Photostatic copy of letter of 10-4-44, marked Plaintiff's Exhibit 12 for identification.)

Q. Will you state your name, please?

A. Pat Duby.

Q. Where do you live, Mr. Duby?

A. I live at 1535 Bellevue.

Q. You are one of the defendants in this case, are you not? A. Yes, sir.

Q. Now, Mr. Duby, you have been handed what has been marked for identification Plaintiff's Exhibit 12. Will you examine that, please, and see if you ever saw it before, or the original of it?

A. Yes, sir.

Q. You received that letter, did you?

The Court: I didn't hear his answer.

Q. What was your answer? A. Yes, sir.

Mr. Belcher: I want to offer Exhibit 12.

Mr. Skeel: Would you have him describe [78] it?

Q. What is it, Mr. Duby?

A. It is a letter of notification to proceed with the work.

Q. What is the date of it?

A. Dated October 4th.

Q. October 4, 1944? A. Yes, sir.

(Testimony of Pat Duby.)

The Court: 1944 or 1945?

The Witness: 1944.

(Photostatic copy of letter of 1-16-45, marked Plaintiff's Exhibit 13 for identification.)

Q. You have been handed what has been marked for identification Plaintiff's Exhibit 13. Do you remember seeing the original of which that purports to be a photostatic copy? A. Yes, sir.

Q. What is it, Mr. Duby?

A. It is Rider No. 1 of the contract.

Q. What is the date of the letter?

A. Dated January 16th.

Q. Written by you? A. Yes, sir.

Q. January 16, 1945? A. Yes, sir.

Mr. Belcher: I want to offer that in evidence.

Mr. Skeel: No objection. [79]

The Court: It is now admitted.

(Plaintiff's Exhibit 13 received in evidence.)

(Photostatic copy of letter of 1-20-45, marked Plaintiff's Exhibit 14 for identification.)

Q. You are being handed what has been marked for identification as Plaintiff's Exhibit 14, which purports to be a photostatic copy of something. Did you ever see the original of that before?

A. I didn't receive it, I wrote it.

Q. You wrote it? A. Yes, sir.

Q. Did you ever see it before? You wrote the letter? What is the date of the letter?

A. January 20, 1944.

(Testimony of Pat Duby.)

Q. 1945? A. 1945.

Mr. Belcher: I want to offer that exhibit.

Mr. Skeel: No objection.

The Court: Admitted.

(Plaintiff's Exhibit 14 received in evidence.)

Mr. Belcher: I think perhaps we can save considerable time, if your Honor will permit it, I will have these other three fastened together. [80]

The Court: You may do that. Let it be marked Plaintiff's Exhibit 15.

(Photostatic copies of letters marked Plaintiff's Exhibits 15(a), 15(b) and 15(c) for identification.)

The Court: You should expedite the examination of the witness. He is not comfortable on account of his bad cold.

Q. (By Mr. Belcher): You have been handed three sheets of paper marked for identification as Plaintiff's Exhibits 15(a), (b) and (c).

A. Yes, sir.

Q. They purport to be photostatic copies of letters. Are you familiar with the originals of those? A. Yes, sir.

Q. Were the letters written by you?

A. Yes, sir.

Q. To whom? A. To various——

Q. Refer to 15(a).

A. 15(a) was written——

Q. What was the date of that?

A. February 2, 1945.

(Testimony of Pat Duby.)

Q. 15(b) ?

A. March 20, 1945, to Mr. Wilson.

Q. And 15(c) ? [81]

A. April 3, 1945, to Mr. Wilson.

Mr. Belcher: I want to offer these in evidence.

Mr. Skeel: No objection to 15(a), (b) and (c).

The Court: Admitted.

(Plaintiff's Exhibits 15(a), (b) and (c) received in evidence.)

The Witness: What about this other one?

(Photostatic copy of letter of 5-10-45 marked Plaintiff's Exhibit 16 for identification.)

The Court: Do you offer 15(a), (b) and (c) ?

Mr. Belcher: Yes, your Honor.

Mr. Skeel: No objection, but I thought you were offering (d) also.

The Court: There is another one which you might think is (d) which has been marked Plaintiff's Exhibit 16.

Q. (By Mr. Belcher): You have been handed what has been marked for identification as Plaintiff's Exhibit 16. Did you ever see the original of that? A. Yes, sir.

Q. It is a letter written by you, is it not?

A. Yes, sir.

Q. What is the date? A. May 10, 1945.

Mr. Belcher: I want to offer No. 16.

Mr. Skeel: No objection. [82]

The Court: It is admitted. It is a dark back ground. It is intended to be a white one and the

(Testimony of Pat Duby.)

photographic process was deficient in some way, but the Court will admit it because it is intended to be a white background. It is admitted.

(Plaintiff's Exhibit 16 received in evidence.)

(Photostatic copy of letter of 10-31-46 marked Plaintiff's Exhibit 17 for identification.)

Mr. Belcher: Exhibit 17, if your Honor please, purports to be a photostatic copy of a letter written by Mr. Henry W. Parrott, which Mr. Parrott, I understand, is agreeable may be introduced in evidence.

Mr. Parrott: It is all right with me.

Mr. Belcher: I offer 17.

The Court: It is now admitted.

(Plaintiff's Exhibit 17 received in evidence.)

Mr. Belcher: In the interests of saving time, your Honor, may I have four photostatic copies affecting the Continental Casualty Company marked together?

The Court: Let them be marked Plaintiff's Exhibits 18(a), (b), (c) and (d).

(Photostatic copies of letters marked Plaintiff's Exhibits 18(a), (b), (c) and (d) for identification.) [83]

Mr. Belcher: I think that is all I need Mr. Duby for.

The Court: Let's dispose of this last marked

(Testimony of Pat Duby.)

exhibit before we excuse him from the stand. When the clerk marks them, will you give the date of (a), (b), (c) and (d). Would that help you identify them?

Mr. Skeel: Yes, your Honor.

The Clerk: 18(a) is April 23, 1945; 18(b) is September 11, 1946; 18(c) is October 9, 1946; and 18(d) is April 25, 1947.

Mr. Belcher: In conference with counsel representing the Continental Casualty Company, if your Honor please, it is stipulated that the letter from the Continental Casualty Company to D. S. Anderson, Chief, Contract and Service Branch of the Department of Commerce, Civil Aeronautics Administration, Seattle 14, Washington, with relation to Bond No. 904912, the letter being dated April 23, 1945, may be admitted in evidence as Plaintiff's Exhibit 18(a).

The Court: A similar stipulation relating to (b), described by you as what kind of a letter?

Mr. Belcher: A letter addressed to D. S. Anderson, Chief, Contract and Service Branch, Department of Commerce, Civil Aeronautics Administration, at Seattle, from Warner M. Bruce, Superintendent, Continental Casualty Company, dated April 23, 1945. [84]

Mr. Skeel: That is (a)?

The Court: I understood you to say in effect that (b) is covered by a similar stipulation, and will you follow that up by describing what (b) is?

Mr. Belcher: (b) is a letter from Carlin Mason,

(Testimony of Pat Duby.)

Claims Reviewer for the Comptroller General of the United States, addressed to the Continental Casualty Company, Northwest Claim Department, 1411 Fourth Avenue Building, Seattle, Washington, dated September 11, 1946.

(c) is a letter on the letterhead of the Continental Casualty Company, dated October 9, 1946, addressed to the General Accounting Office, Claims Division, Washington 25, D. C., to Mr. Carlin Mason, Claims Reviewer, the letter being signed by Warner M. Bruce, Superintendent, Continental Casualty Company.

18(d) is a letter, a photostatic copy of a letter dated April 25, 1947, from the Assistant Comptroller General of the United States, under his file B-64561, addressed to the Continental Casualty Company, Northwest Claim Department, 1411 Fourth Avenue Building, Seattle, Washington, and signed by the Assistant Comptroller General of the United States. The signature is not legible.

I now desire to offer all three of these.

Mr. Skeel: No objection to 18(a), (b), (c) and (d).

The Court: Each of them is now admitted as one exhibit. [85]

(Plaintiff's Exhibits 18 (a), (b), (c) and (d) received in evidence.)

Mr. Belcher: So far as Mr. Duby is concerned, your Honor, we have no further examination.

The Court: Was there anything you wished to

inquire by way of cross-examination within the scope of this inquiry, having in mind that you may wish to call him as defendants' witness?

Mr. Skeel: No, your Honor, I have no questions of Mr. Duby at this time.

The Court: You may step down. Call the next witness.

Mr. Belcher: We rest, your Honor.

The Court: Plaintiff rests. The defendants may proceed.

Mr. Belcher: With this reservation, your Honor, I ask that those portions of the original files of the Aeronautics Administration which have been marked and admitted in evidence, that I may be permitted to substitute white background photostatic copies in lieu of the originals and withdraw the originals.

Mr. Skeel: I have no objection to that.

The Court: That may be done at counsel's future convenience.

Mr. Belcher: I did not want to stop the trial to do it, your Honor. Before we leave the courtroom I shall [86] substitute them, if that is satisfactory.

Mr. Skeel: That is agreeable.

The Court: If you get a white background photostatic copy of Plaintiff's Exhibit 8, do you wish to reserve the right to offer that?

Mr. Belcher: The trouble is, your Honor, I didn't have that at the time I sent these down to have them rephotostated.

The Court: Has anyone a copy of it?

Mr. Belcher: I would like, if your Honor please, the privilege of withdrawing it for the purpose of having a copy made.

The Court: Notwithstanding the closing of plaintiff's case in chief, is there any objection to that request?

Mr. Skeel: That is Exhibit——

The Court: Plaintiff's Exhibit 8. It is a certified copy. It has a certificate of some defendant representative attached to it. He wishes to withdraw that for the purpose of making a white photostat of it.

Mr. Skeel: I have no objection.

The Court: That exhibit, identified as Plaintiff's Exhibit 8, is now withdrawn and is returned to counsel who produced it. Take the clerk's marks off of it. The defendants may now proceed.

Mr. Parrott: You may resume the stand, Mr. Duby. [87]

The Court: You have already been sworn, Mr. Duby.

PAT DUBY

called as a witness by and on behalf of defendants, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Parrott:

Mr. Parrott: At this time, if your Honor please, the defendant Pat Duby would like to request that Exhibit 7 be particularly identified also as De-

(Testimony of Pat Duby.)

defendant Duby's exhibit. Has that exhibit been so identified?

The Court: It has been admitted in evidence as Plaintiff's Exhibit 7.

Mr. Parrott: Would it be proper to have that also identified as an exhibit on behalf of defendant Duby? If possible, I would like to have it so endorsed.

The Court: Does anybody object to the defendant making use of that evidence as evidence in the case for all parties litigant?

Mr. Belcher: No, your Honor.

The Court: I am sure all parties litigant in the case may call to their assistance that letter, no matter by which side introduced in evidence.

Mr. Parrott: If your Honor please, we have introduced [88] in evidence particularly the entire file made of the bankruptcy of H. L. Duby, No. 37366 in this court. The defendant has alleged in his answer that he has been granted a discharge in bankruptcy. The formal original order is in the file. Schedule A-3, creditors whose claims are unsecured, is also attached to and is a part of the original bankruptcy file. As to those two portions of the file, I would like to have the same stipulation, that all parties to the proceeding have equal recourse as either the discharge in bankruptcy may assist or not assist them, and the same as to Schedule A-3, which is a schedule of unsecured creditors, and particularly shows the nature of the scheduling of the transaction involving this Bow Lake

(Testimony of Pat Duby.)

Airport, this being the contract we are speaking about.

Mr. Belcher: We have no objection, your Honor.

The Court: Let the record show the attitude of both counsel.

Mr. Skeel: Do I understand or do I not, if your Honor please, that the entire bankruptcy file and all matters therein are now made exhibits so that there need not be any special reference or request to introduce additional items which are already included in there?

The Court: Plaintiff's Exhibit 11 has been received in evidence, and I understand it is the file of the [89] Clerk of this Court in the bankruptcy proceedings and contains all papers in those proceedings which were filed and are now on file in the Clerk's office of this Court relating to the bankrupt therein named.

Mr. Parrott: And they are all in evidence.

The Court: They are all in evidence. So far as I know, even if someone objected to defendant using whatever evidence there is in the file for the defendant's benefit, the objection would be without avail. I do not understand that the Court may not consider as evidence in favor of some other party documents or testimony introduced on behalf of a different party to the litigation.

Q. (By Mr. Parrott): You are H. L. Duby, named as a defendant in this action?

A. It is Pat Duby in the action, isn't it?

Q. Is Pat Duby and H. L. Duby, who is men-

(Testimony of Pat Duby.)

tioned in the bankruptcy proceedings No. 37366 that we have been discussing, are you one and the same person? A. Yes, sir.

Q. Pat Duby, as you did business, was more or less of an assumed name, was it?

A. It is a name I have used all my life.

Q. You have used the name of Pat Duby all your life, but you were christened H. L. Duby, is that right? [90]

A. I was christened H. L. Duby.

Q. But H. L. Duby and Pat Duby are the same person? A. That is right, sir.

Q. And Pat Duby is the same Duby that was discharged in this bankruptcy proceeding?

A. Yes, sir.

Q. Will you be kind enough to tell the Court the circumstances surrounding this operation at Bow Lake, starting with the original inception of how your attention was called to it and the conversations you had with different representatives of the Government as to its original inception?

A. Well, after five years some of that stuff is bound to slip my mind, but I have got kind of a general idea. We went out to look the job over with an estimator, Mr. Newberry. We inquired and found out all we could about it. There was just a little trickle of water; we bid it that way. We got ready to do the job; there was a river going down through there. The job was let.

The Court: How much time elapsed between those two occasions just mentioned by you?

(Testimony of Pat Duby.)

The Witness: That was about the 15th of August we looked to job over, and they gave it to us on October 16, when the rainy season had started. We moved our equipment in there and struck nothing but mud, and the superintendent and I put in 24 hours a day there for [91] four months trying to bring the thing out, because I didn't want to give up.

Q. (By Mr. Parrott): Did anyone from the Aeronautics Authority accompany you or show you around?

A. At the particular time we went down there, there was no one available.

Q. I beg your pardon?

A. At the particular time we went down to look it over, there was no one available. The man that had been there—I think we were there the day after. I met Mr. Hall shortly after that and he told me we were there the day after we should have been.

Q. Who was the first man connected with the Aeronautics Authority that you ever saw at the place? A. Mr. Affleck.

Q. How long was that after you made your bid?

A. Well, from about the middle of August until the 6th of October. I didn't meet Mr. Affleck until after I had went on the job.

Q. Was Mr. Hall on that job when you first started to work there?

A. I didn't meet Mr. Hall until quite a while later. Mr. Affleck was on the job when I went there,

(Testimony of Pat Duby.)

and Mr. Hall came in the picture shortly after, I would say a month after, perhaps. [92]

Q. You think about a month after?

A. I think so.

Q. And that first month all your dealings, practically all your dealings so far as the Civil Aeronautics Authority might be concerned, were with Mr. Affleck?

A. That is right.

Q. Who was the first one that you approached after you found the conditions as they were when you started to work?

A. I approached Mr. Hall and Mr. Affleck both. I met them both by the time I got into the conditions.

Q. What authority did Mr. Affleck appear to have there?

A. He seemed to be the resident engineer. We called them inspectors, from our point of view.

Q. Just tell the Court what you found there when you started to do this work, what you found the situation to be.

A. We got into the ground a couple of feet and there was no bottom to it. Everything we put in there would go right on through, and Mr. Affleck seemed to be quite sympathetic with the deal, and we thought we could work something out.

I went down and met Mr. Frazer, I believe his name is, at the office and we talked it over. Shortly after that Mr. Affleck left, I do not know just exactly what time. He had two or three other boys on

(Testimony of Pat Duby.)

the job. They were very helpful, but they couldn't do us much good. They couldn't [93] stop the mud. By the time we got this thing in operation, the rain was poring down in torrents. I think the records will bear me out, that they had more rain that year than they ever had in this country, and we had a regular river to contend with.

Q. How deep was—what was this undersurface condition generally?

A. It was a peat bog and a quicksand, and you could throw gravel in there by the truckload and never see it again.

Q. You could do what?

A. You could throw gravel in by the truckload and never see it again. It would go clear out of sight, trying to build up a base you could work on, and that is what cost all the money, a good deal of the money.

Q. In that operation, which end did you have to work from? A. Worked from the top end.

Q. By the way, how far was this operation from the airport proper?

A. Approximately half a mile.

Q. It was kind of downgrade, wasn't it, from the airport? A. A gradual slope, yes.

Q. That was sloping towards Puget Sound?

A. Yes, sir. I believe if they had allowed us that modification order in time we might have saved quite a little time on the job and a few other things, because if we [94] started at the bottom we could

(Testimony of Pat Duby.)

have kept the water out of our way, but we started at the top and we was in the water all the time.

Q. What, if any, effort did you make to try to change that system of operating?

A. Couldn't change it until we had the modification order.

Q. You suggested it, did you?

A. That is where I got the modification order, I believe, sir.

Q. What would you say was the thickness of this sand condition you spoke about?

A. It would vary from 2 feet to 20. It was in several places in this project. Some places it would be—we could take care of it in a couple of feet. Other places, we would go down 10 or 15 feet.

Q. When you took this contract, started on the work, from the indications as you saw them on the ground what would be the total depth that you would have to go in any of the work that you were to perform?

A. Ordinary depth, I think the biggest depth of any would be approximately 10 feet. I think Mr. Hall would possibly be better.

Q. Would that be at the ends of this main dam or what?

A. No, that would be all the dams going down, and the [95] further down you went the less depth you had to go to and the more quicksand you run into.

Q. Under normal conditions, was there anything to indicate in carrying on this work that it would

(Testimony of Pat Duby.)

ever be necessary for you to bring in this clamshell?

A. Nothing at all on the ordinary—we could have done it with a bulldozer under ordinary conditions.

Q. What is a clamshell? You say in your letter of January 20, 1945, one of the exhibits here, that your expense for clamshell standing by on these excavations alone was \$3592.41. When you made up that figure, when you wrote that letter, was that the correct figure?

A. That was absolutely correct. Everything on the job was costed in the office by the girl.

Q. Just what did that machine do, that clamshell?

A. Well, it put a \$35 man to work and a \$20 man to work watching us dig the dozer out so we could use the dozer, and various other things of that sort. It was really rough.

Q. Was it necessary to have this standby machine there?

A. Yes, sir.

Q. What do you mean by a \$35 man?

A. The engineer was drawing, with his overtime, \$35 a day.

Q. That was the engineer on the clamshell?

A. And the oiler would draw \$20. [96]

Q. Who did you rent the clamshell from?

A. I believe it was Nels Hedeem.

Q. I believe you said that there was nothing anticipated, and you would not normally be required to undergo an item of expense like this \$3592.41 for this clamshell business, is that right?

(Testimony of Pat Duby.)

A. It wouldn't be anticipated, no, sir.

Q. You say here that you had a pumping expense of \$1799.59. Will you explain that to the Court, please?

A. Well, working from the top down, we had so much water we had to put in big pumps, so the pumpers from the union worked three shifts.

Q. That pumping operation was a three-shift operation? A. Yes, sir.

Q. You had to keep ahead of the water or you couldn't do anything at all, is that right?

A. We had to keep it down so we could let something stop there.

Q. From the condition of that country at the time you examined it and made the bid, was there anything to indicate any such abnormal expense as that?

A. Nothing whatever. There was kind of a ravine cut where this creek ran down. Some places it was 6 or 8 feet deep, depending on the level of the ground, about 6 feet deep, and there was just a little trickle of water running [97] down the middle of it. It looked like a gravel bottom from where we were. We didn't get down in it, we were more or less dressed up on those days.

Q. You have an item of \$1038.75 for a bulldozer. Was that an anticipated expense at the time of the making of this bid?

A. No, it wasn't. All the concrete had to be pulled in with a bulldozer because of the soil conditions.

(Testimony of Pat Duby.)

Q. And the items that I have mentioned, under anything like normal conditions would it have been necessary to use a bulldozer to haul the concrete in?

A. No, sir, the concrete company would have delivered it and poured in right in the dam.

Q. They pour it right there under normal conditions? A. Yes, sir.

Q. And the way it was you had to have this bulldozer to handle it? A. That is right.

Mr. Belcher: I don't want to object too much, your Honor, but it seems to me this is an unusual way for counsel conducting the examination.

The Court: I understand that this is in pursuance of the allegations of the affirmative defenses which are still before the Court. I do not know what the outturn will be respecting those affirmative defenses, but [98] the objection is overruled.

Q. What assurance were you given by Mr. Affleck as to what you could expect the Civil Aeronautics Authority to do if you continued with the work, that is, after you learned of these conditions?

A. We had just finished a job at McChord Field, and Mr. Affleck seemed to be prejudiced in our favor, and he thought most anything we asked for we would get that was reasonable, like extension of time and more money. We proceeded under the same idea. We got more money from McChord for the same setup exactly.

Q. You asked for various extensions of time and they were not granted, is that true?

(Testimony of Pat Duby.)

A. They weren't turned down, either, until after the thing was finished.

Q. In construing the contract which you signed, there are provisions in there that indicate that if you are delayed because of an act of God or weather conditions or circumstances beyond your control or other conditions that could not be discovered by the observation or use of reasonable foresight, that a condition like that would be corrected and you would not be penalized for it, is that correct?

A. That is the impression I had, sir.

Q. As you read the contract, that is what it called for, wasn't it? [99]

A. Oh, yes. I thought you meant my conversation.

Mr. Parrott: I think that is all.

Q. (By Mr. Skeel): Mr. Duby, as shown by Exhibit 14, which sets forth that an itemized bill in triplicate shows that you expended \$17,687.02 on this job, is that the correct figure of your expenditures?

A. Yes, sir.

Q. Total overall expenditures?

A. Yes, sir.

Q. Does that figure include the amount which Continental Casualty Company as surety on your payment bond had also paid for labor and material claims?

A. No. They are bonded only for one-half, isn't it, of the original contract.

Q. So that any amount the Continental Casualty

(Testimony of Pat Duby.)

Company paid under its payment bond is in addition to this \$17,687? A. That is right.

Q. Now, Mr. Duby, in your letter of May 10, 1945, which is Exhibit 16, you stated in part as follows: "As to the \$20.00 per day penalty, we finished the main part of the work on Jan. 12, and had to wait until the mud dried sufficiently to allow us to clean up, which was April 2. The mud was so sloopy we could not get machinery in until that time, which would make the penalty time 53 days instead [100] of 133 as shown on the statement." Is that substantially correct? A. That is.

Q. What was the stage of the completion of your contract on January 12, 1945?

A. On January 12, everything was in excepting the cleanup, and we had to do some filling on the berms.

Q. On January 12, 1945—

A. And clear out some debris below 200th Street.

Q. On January 12, 1945, the contract was substantially completed except for cleanup, is that correct? A. That is right.

Q. In connection with this modification order, Change Order No. 1, which was dated November 4, 1944, when was that given or delivered to you?

A. It was delivered to me about the 15th of December. I have the record on it someplace.

Q. And what did Change Order No. 1 do? How did it change your work or help you?

A. When we had the project about done, the water wouldn't run off because it didn't have any

(Testimony of Pat Duby.)

place to go. The project was lower than the country so we had to clear the drainage canal below to let the water out.

Q. Do I understand the effect of Change Order 1 was to allow you to work in the bottom so as to keep out of the way [101] of the oncoming water instead of the top where you had to fight it all the way? A. Yes, sir.

Q. Is that what you stated a short while ago in your testimony, that you kept requesting the Government to allow you to start at the other end so as to avoid all this water? A. Yes, sir.

Q. Do you know where all this water came from?

A. It came off of that Bow Lake airfield.

Q. Was it rain or was it in the nature of underground springs?

A. Oh, no, it was all rain, practically all rain. There might have been some underground springs, but if there were, they were not noticeable.

Q. All of your records in connection with this matter have been lost or destroyed, is that correct?

A. Yes, sir.

Q. You gave them all to the trustee in bankruptcy at the time you went into bankruptcy?

A. Yes, sir.

Q. And you were never able to get them back, is that correct? A. That is right.

Q. Do you recall, Mr. Duby, when you received progress payments in connection with the performance of this contract [102] from the Government?

A. We received them around the 25th of every

(Testimony of Pat Duby.)

month following the month the work was performed. They came from Washington, mailed direct.

Q. I will ask you what percentage of the entire contract price you received after December 1, 1944?

A. I think our first payment was in December.

Q. The first payment received under the contract was in December, 1944?

A. I think it was, I couldn't say offhand.

Q. So that the entire contract price and all moneys which you received thereunder were received subsequent to December 1, 1944?

A. I am pretty sure, but I don't know about the——

Q. And starting then in December you received a sum each month, December, January?

A. That is right, whatever the engineer's estimate amounted to.

Q. Did you receive a sum each month following December, 1944? A. Yes, sir.

Mr. Skeel: I have no further questions.

Cross-Examination

By Mr. Belcher:

Q. When did you first discover that you were running [103] into what you claimed to be unusual conditions after you entered upon the work?

A. About ten days after we started the job.

Q. Do you remember what day you started the job?

A. We started it about the 10th of October, approximately.

(Testimony of Pat Duby.)

Q. 10th of October? A. Yes, sir.

Q. And under your contract you would have to have that work done by the 10th of November, wouldn't you? A. Yes, sir.

Q. And isn't it a fact that in October, 1944, to be exact, the 31st of October, 1944, the Civil Aeronautics Authority wrote you a letter which has been introduced here as Exhibit 9 in which it is said to you: "Your attention is called to the fact that the time for completion of the work will expire November 4, 1944, and that to date, practically no progress has been made." You got that letter?

A. Yes, sir.

Q. Was that the truth or wasn't it?

A. It was the truth no progress had been made. We started in in the mud and we stayed there.

Q. And in that letter they further said: "It is further pointed out that due to the nature of the work, its completion becomes increasingly difficult as the season advances and that the Government's interest requires that construction be [104] completed at the earliest possible time." Now, up to that time you hadn't had any rain at all, had you?

A. Yes, sir, we had.

Q. When did you start to suffer from excessive rains?

A. We started suffering the minute we moved on the job, sir.

Q. When?

A. It started raining the minute we moved on the job, kept it up steady.

(Testimony of Pat Duby.)

Q. Then this further statement was made by Mr. Wilson, the administrative officer for the Civil Aeronautics Authority, in that letter of October 31: "You are therefore advised that if facts demonstrating your intention and ability to successfully complete the contract within a reasonable time are not presented to this office prior to November 4, 1944, it is our intention to terminate your right to proceed with the work in accordance with Article Nine of the contract." A. Yes, sir.

Q. Did you go and see Mr. Wilson after that?

A. I did.

Q. What was the result of that?

A. I must have stayed on there, I lost all the money I had.

Q. You assured him, as a matter of fact, that you could complete the contract? [105]

A. I did. I completed the contract.

Q. And in that same letter Mr. Wilson said to you: "In the event your right to proceed is terminated, the Government will take over and complete the work and you and your sureties will become liable for any excess costs occasioned the Government thereby" and you acknowledged receipt of that and your acknowledgment is on the Exhibit 9? A. Yes, sir.

Q. Mr. Duby, you knew, did you not, that all the time that you were working on this project the Government or the Civil Aeronautics Authority had somebody there supervising the work?

A. And sympathizing with me.

(Testimony of Pat Duby.)

Q. You knew that the Government was put to a considerable expense in the overhead for supervision as well as their work in the office?

A. I don't believe they had any additional supervision.

Q. You knew, didn't you, that that figure——

The Court: How much more time do you need?

Mr. Belcher: I will be through in one or two questions, your Honor.

The Court: Proceed.

Q. (By Mr. Belcher): Mr. Duby, you knew that the expense to the Government of this supervision far exceeded the sum of \$20.00 per day, didn't you? [106]

A. I do not, sir.

Q. What?

A. I didn't know that and I don't know it yet.

Q. You knew there was at least one engineer supervising your work and an additional number of crew members?

A. No.

Q. You knew that there was considerable office work to be done in connection with this contract, did you not?

A. They had their force, didn't they? They didn't have any additional help on my account.

Q. Is it your opinion, Mr. Duby, that at the time you entered into this contract and agreed that if you did not complete the work within the time allotted by paragraph 1 of the contract, which was 30 days, and which had been extended, that the \$20.00 per day which you agreed to pay for every day over and above the 46 days you were engaged

(Testimony of Pat Duby.)

in this work didn't begin to compensate the Government for the expense it was put to in the supervision of this job, is that true?

A. No, I don't know anything about how they handled their affairs at all.

Mr. Belcher: That is all.

Redirect Examination

By Mr. Parrott:

Q. You never heard of the Government being put to any [107] expense, did you?

A. I don't know how they handled their accounting.

Q. Was there anything you know of where they were put to any extra expense?

A. They had one inspector down there some of the time, but he had other jobs to inspect, too.

Q. That was while you were doing the work, wasn't it? A. Yes, sir.

Q. That wasn't during this overtime, not over this period there was nothing going on there? There was no inspector there, was there?

A. I don't believe there was. I don't know for sure.

Q. As far as you know, was there anybody there in March?

A. Nobody there after we poured the last of the dam until we cleaned up.

The Court: The Court will have to continue this trial. This trial is continued until Tuesday, the first day of May, at 10 o'clock in the forenoon or as soon

(Testimony of Pat Duby.)

thereafter as counsel can be heard. I think it would be well for you to have written arguments and citations of authorities in this case prepared at that time.

Mr. Belcher: I will, your Honor. Does Your Honor desire before leaving the courtroom tonight or at some time prior to conclusion of the trial that these copies be substituted? [108]

The Court: I have no preference about that. I think you should do that in the Clerk's office where it is convenient to do it at some time convenient to counsel, and you can arrange that any day that is convenient to counsel. You are excused until May first.

Mr. Belcher: May I say this, your Honor, Exhibit 8, which is the black photostatic copy, I have sent down to have photostated, so it will have a white background. I have the privilege of offering that?

The Court: Yes, you have that reservation already made in the record, I believe.

(At 4:40 o'clock p.m., Tuesday, April 24, 1951, proceedings adjourned until 10:00 o'clock a.m., Tuesday, May 1, 1951.)

May 25, 1951, 2:00 P.M.

The Court: Are counsel and parties ready to proceed with the remaining trial proceedings in the case entitled United States of America, Plaintiff, vs. Pat Duby, doing business as Pat Duby Com-

(Testimony of Pat Duby.)

pany, and Continental Casualty Company, a corporation, Defendants, No. 2211?

Mr. Belcher: We are ready to proceed.

Mr. Skeel: We are ready, your Honor. [109]

Mr. Belcher: I think Mr. Duby was on the stand.

The Court: You will resume the stand, Mr. Duby. You have already been sworn.

Recross-Examination

By Mr. Belcher:

Q. Mr. Duby, I believe you testified on direct examination that you were on the job 24 hours a day and you had to have special equipment, a clamshell and some other special equipment. What was that?

A. Well, we had the clamshell, a couple of dozers.

Q. Was that occasioned by the fact that you had run into quicksand?

A. It was occasioned by the fact that we run into difficulties all the way through and we couldn't handle it with anything else.

Q. As a matter of fact, for this particular job, even under the most favorable conditions, it would be necessary for you to have that equipment on the job to do the work, wouldn't it?

A. No, sir, it would not. You could handle that job with a bulldozer, most of it.

Q. I can't hear you.

A. You could handle the job with a bulldozer alone under ordinary conditions.

(Testimony of Pat Duby.)

Q. Have you the specifications before you?
What were [110] the specifications, do you recall?

A. I do not, sir.

Q. Do you remember, Mr. Duby, whether or not among the specifications certain side casting was required?

A. Yes, there was some side casting.

Q. How would you do that without a clamshell?

A. Mr., I have been away from that job for five years. I don't know what had to be done on it now.

Q. You don't know then whether it is a fact that you had to use this clamshell as special equipment because of difficulties?

A. There was very little side casting at all, and all the side casting could have been pushed out with a dozer, I am sure.

Q. What did you do your excavating with?

A. There wasn't any excavating to do in particular, only side.

Q. Isn't it a fact that you had——

A. What little excavating we would have had to have done, we could have got somebody in there on a cost job.

Q. Isn't it a fact that you had this clamshell from the very beginning of the time you started to work?
A. No, sir, I did not.

Q. You are sure of that?

A. I am positive of it. [111]

Q. You had a superintendent on the job, didn't you?
A. Yes, sir.

Q. Did he work 24 hours a day?

(Testimony of Pat Duby.)

A. He worked about 16.

Q. You wouldn't have had to work 12 or 14 or 16 hours a day or your 24 hours a day had you completed this contract at the time that you agreed to complete it, would you?

A. We didn't figure on it, sir.

Q. You went out and examined the job before you bid on it, didn't you?

A. Didn't you remember that? We had that all out last week.

Q. Just answer my question, please.

A. What was your question?

Q. Read the question, please.

(Last question read by reporter.)

A. I examined the job under favorable conditions, yes, sir.

Q. And you were fully informed as to what you were up against on the contract before you ever made your bid?

A. Not fully informed, no, sir. I had no intimation we were going to have flood waters to contend with.

Q. Couldn't you see that it was in a locality where you might run into flood waters?

A. I don't think anyone could have seen it when I [112] looked the job over.

Q. How much time did you spend in looking over the ground before you made your bid?

A. The estimator made the bid and I looked it

(Testimony of Pat Duby.)

over, and he was out there two or three trips and I was out once.

Q. You went out only once?

A. That is all I went out.

Q. Who was the man who went out in your behalf? A. Mr. Newberry.

Q. He was your superintendent?

A. Estimator.

Q. He didn't report any unusual conditions to you, did he? A. No, sir.

Q. How much time, if you know, did he spend?

A. He spent about a week on it.

Q. He spent about a week on it?

A. Off and on.

Q. And he made a complete report to you as to what he found, didn't he?

A. As to what he found, yes. I made the bid.

Q. Did he make that report in writing?

A. No, sir.

Q. Orally?

A. The only report that was in writing was the bid, and [113] he justified his figures.

Q. And it was after you had had the report made to you by Mr. Newberry that you made your bid? A. Yes, sir.

Q. At that time it wasn't raining, was it?

A. No, sir.

Q. You were notified to proceed in accordance with the awarding of the contract?

A. Yes, sir.

Q. And you did proceed? A. Yes, sir.

(Testimony of Pat Duby.)

Q. When did you first run into difficulty?

A. About a week after we went to work, two or three days.

Q. What if anything did you do with respect to reporting that to the Civil Aeronautics Authority?

A. The engineer on the job knew all about it, sir.

Q. The gentleman who was on the job was Mr. Hall, wasn't it?

A. He wasn't on the job at first.

Q. He wasn't on the job at all?

A. He wasn't on the job at first.

Q. Who was the man who was on the job first?

A. I don't know his name now. Mr. Hall possibly could tell you what his name was. I have forgotten it.

Q. When you signed this contract, Mr. Duby, you read [114] it over, didn't you?

A. Surely.

Q. And each and every part of it?

A. Yes, sir.

Q. And you knew, did you not, that the contract, by Article 9, provided as follows: "If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1 * * *"—which was 30 days, as I recall, is that correct? A. Yes.

Q. "* * * or any extension thereof, * * *"—you were given 16 days extension, were you not?

(Testimony of Pat Duby.)

A. Not on that contract.

Q. That was additional work?

A. Additional work.

Q. “* * * or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor’s right to proceed is so terminated, the Government [115] may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event it will be impossible to determine the actual damages for the delay and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: * * *.”

You knew that condition in the contract?

A. Yes, sir.

Q. “Provided, That the right of the contractor

(Testimony of Pat Duby.)

to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall [116] within 10 days from the beginning of any such delay (unless the contracting officer, with the approval of the head of the department or his duly authorized representative, shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, * * *."

You were familiar with that? A. Yes, sir.

Q. You started this work on what date, do you recall? A. No, sir.

Q. Would it be October 4, 1944?

A. I don't remember, sir.

Q. And the 30 days would bring it up to November 4, wouldn't it? A. Yes, sir.

Q. You know there wasn't very much rain between October 4 and November 4, 1944, don't you?

(Testimony of Pat Duby.)

A. I know there was considerable rain.

Q. You know what?

A. I know there was considerable rain.

Q. Unprecedented?

A. There has never been known to be as much as they had [117] that year. Everybody said, everyone in the country that is acquainted with the country, said they never had so much rain.

Q. You might be mistaken on that, mightn't you?

A. I could be. I was mistaken when I signed the contract.

Q. If the records of the Weather Bureau show the contrary, you would agree that the weather records were correct, wouldn't you?

A. I suppose I would have to, sir.

Q. As a matter of fact, you didn't run into a great deal of rain until long after the time had expired under your contracts for the completion of this work, isn't that true?

A. No, sir.

Q. It isn't true?

A. I don't think it is, sir.

Q. And you are sure of that?

A. I say I don't think it is, sir. I haven't the Weather Bureau's records.

Q. You know when the rainy season in this territory is, don't you?

A. Well, that particular year I think we had a long one.

Q. What is your best judgment? Was there

(Testimony of Pat Duby.)

more rain in October than there was the year before?

A. That has been five or six years, Mister, and I can't remember how much rain fell or when it fell, but I know we [118] had a terrible tussle.

Q. How many jobs of this type have you done in your experience?

A. Probably five or six.

Q. Five or six? A. Yes, sir.

Q. How many had you done prior to the time you took this contract?

A. That is the last job I did.

Q. This was the first job you did?

A. That is the last job I did. That ended me.

Q. Where were the others?

A. Silver Lake, Mukilteo, Lynn Mountain, McChord Field.

Q. Were they private work or Government work?

A. Government work, Army Engineers.

Q. What department of the Government?

A. Army Engineers.

Q. You had trouble on most of those contracts, didn't you?

A. Didn't have trouble on any of them.

Q. Mr. Duby, where on the project did you contact quickstand?

A. Well, down at the bridge and up at the first weir.

Q. How big a space was that?

A. I beg your pardon?

(Testimony of Pat Duby.)

Q. What size area was it that you ran into where there [119] was quicksand?

A. Possibly a quarter of a mile, I imagine.

Q. And how long was the project altogether?

A. About a quarter of a mile.

Q. Do you mean to say you ran into quicksand throughout the whole operation?

A. We run into quicksand, gravel and sliding conditions.

Q. Which one, quicksand or gravel? Nothing unusual about gravel, is there?

A. No, I guess not.

Q. You hadn't familiarized yourself with the terrain of that country before you took the contract, had you? A. No, sir.

Q. And the fact that you ran into gravel—you didn't expect to run into gravel, is that true?

A. We didn't expect to run into that particular kind of gravel, sir.

Q. Where did this gravel differ from gravel you usually run into?

A. Gravel with a clay mixture can be handled a lot easier than gravel mixed in with this peat and quicksand that you can't handle.

Q. Do you want to be understood that this whole project, the whole length of the project you ran into quicksand mixed with gravel? [120]

A. Most of it, yes, sir.

Q. Could that condition have been observed by you by careful study before you bid?

(Testimony of Pat Duby.)

A. The way I know it now, it could have, but I didn't know it then.

Q. Can you answer my question, please?

The Court: Read the question and answer.

(Last question and answer read by reporter.)

Mr. Belcher: I submit, if your Honor please, that is not responsive.

The Court: Can you answer more directly? Yes or no would be one way of answering it.

The Witness: I don't believe it could.

The Court: Is that the answer, "I don't believe it could"? Did you intend the last statement to be your answer?

The Witness: Yes, sir.

Mr. Belcher: I think that is all.

Redirect Examination

By Mr. Skeel:

Q. Counsel asked you about extensions of time. Did you make any request for extensions of time?

A. Not written requests. We were so tied up with the job that we would tell the engineer in charge, but we didn't have time to sit down and write anything. We were working [121] all the time trying to get the job done.

Q. Did you make oral requests?

A. I did. I howled to everybody that the Civil Aeronautics had about giving us time on the job.

Q. What were their replies?

A. That I should take it up with their office.

(Testimony of Pat Duby.)

Q. Was any encouragement given you that you would receive an extension of time?

A. I believe they told me that I could figure on some extension of time, yes, sir.

Q. Was any extension of time ever given you other than this one extension which was for other and additional work outside of the original contract?

A. No, sir.

Q. When you encountered all of these difficulties, quicksand, flood conditions and difficult terrain, did any Government officials give you encouragement to keep on and carry on with the contract?

A. No. The only encouragement I got was I was afraid of Mr. Bruce. I wanted to keep my bond good, that is the reason I stayed there and finished it.

(Application for bond marked Defendant's Exhibit A-1 for identification.)

Q. Mr. Duby, there is handed to you what has been marked for identification as Defendant's Exhibit A-1, which is a [122] bond application purportedly signed by you, directed to Continental Casualty Company, requesting issuance of your bond on this particular job. I direct your attention to the bottom of the last page, and I will ask you if that is your signature.

A. Yes, sir.

Mr. Skeel: No further questions.

The Court: Mr. Parrott, do you wish to ask any further questions?

Mr. Parrott: No, your Honor.

(Testimony of Pat Duby.)

The Court: Any further questions, Mr. Belcher?

Mr. Belcher: Nothing further, if your Honor please.

Mr. Skeel: I would offer, if your Honor please, Exhibit A-1.

Mr. Belcher: It is objected to as far as plaintiff is concerned as being merged in the bond already written and is part of the contract that has been introduced in evidence.

Mr. Skeel: You don't understand, counsel. This is only in connection with defendant Continental Casualty Company's cross-complaint against Mr. Duby in the event there is recovery.

Mr. Belcher: If it is not against the plaintiff, we have no objection.

Mr. Skeel: It has no application as to the [123] plaintiff, is not intended as such.

Mr. Parrott: The defendant Duby objects to the introduction of the offered exhibit on the ground that under the facts as pleaded in the case it has no effect as against Mr. Duby.

The Court: The offer is made, as I understand it, as against the defendant Duby in the Continental Casualty Company's cross-action?

Mr. Skeel: Yes, your Honor. This is an action by the United States against Mr. Duby and against Continental Casualty Company. Mr. Duby was the principal on Continental's bond. In the event, and only in the event, the United States is successful in recovering against Continental, Continental has interposed a cross-complaint asking for judgment

(Testimony of Pat Duby.)

over in whatever amount the plaintiff might recover **against it.**

The Court: Will you repeat expressly the conditions of your offer as between the parties?

Mr. Skeel: Yes, your Honor. Defendant's Exhibit A-1 is offered in evidence solely in connection with defendant Continental Casualty Company's cross-complaint against the defendant Pat Duby, and it is not offered in any manner in connection with the plaintiff.

The Court: Or as defense against plaintiff's cause of action against either of these [124] defendants?

Mr. Skeel: No, it has nothing to do with the defense of Continental.

The Court: Upon those conditions, Defendants' Exhibit A-1 is now admitted. The objections made by Mr. Parrott to the offer are overruled.

(Defendants' Exhibit A-1 received in evidence.)

Q. (By Mr. Parrott): We are submitting to you Plaintiff's Exhibit 11, which constitutes the bankruptcy file in the case of H. L. Duby, doing business as Pat Duby Company, Bankrupt, and referring particularly to a portion of Schedule A-3 as shown in the schedules. Will you please look at the sheet which is presented to you, and about the lower half of the sheet you will find there a reference to your performance contract. Will you please read it?

(Testimony of Pat Duby.)

A. "Bankrupt furnished a performance bond in connection with the Bow Lake Civil Aeronautics Contract. The bond was signed by Continental Casualty Company, 1411 - 4th Avenue Building, Seattle 1, Wash. The bond was for \$3,397.00. Many of the items listed above are covered and protected by the said bond. Continental Casualty Company, 1411 - 4th Avenue Building, Seattle, Washington, is hereby listed as a creditor of the bankrupt with the amount contingent upon liability found against the said company on account of the said bond. The following is a list [125] of claims of creditors * * *"

Mr. Parrott: We wish to refer to and offer Plaintiff's Exhibit 11 as an exhibit on behalf of the defendant Pat Duby, which contains the schedule which has just been read into the record.

The Court: I do not see why it is necessary to readmit something that has already been admitted. It is in evidence in favor of and against every party in the case unless there is some ruling directing otherwise. Do you wish in connection with your inquiry just made of this witness to call attention to certain parts of Plaintiff's Exhibit 11?

Mr. Parrott: I have done so, if your Honor please. If it is considered in evidence for all purposes——

The Court: The Court does, unless and until the Court makes a different direction or places some limitation upon the evidentiary effect of the exhibit.

Mr. Parrott: That is all.

Q. (By Mr. Skeel): Mr. Duby, the statement

(Testimony of Pat Duby.)

which you just read from Schedule A-3 having to do with the bond, that is the matter under which Continental Casualty Company paid the full amount of its bond out to labor and material men, is it not?

A. I don't know what they paid, sir.

Q. What? [126]

A. I don't know what Continental paid. I have no way of knowing that.

Q. You knew Continental paid the full amount of its bond out to laborers and material men as a result of this job, did you not? A. I didn't.

Q. You didn't know that?

A. No, I didn't.

Mr. Skeel: No further questions.

The Court: Any other questions by anyone? Mr. Duby is excused from the witness chair. Call the next witness.

Mr. Parrott: As far as defendant Duby is concerned, defendant Duby will rest.

The Court: Defendant Duby now rests.

WARNER M. BRUCE

called as a witness by and on behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Skeel:

The Court: Is this witness called as a part of the defendant Continental Casualty's case in chief?

Mr. Skeel: Yes, your Honor. [127]

(Testimony of Warner M. Bruce.)

Q. Will you state your name, please?

A. Warner M. Bruce.

Q. Do you live in Seattle? A. Yes, sir.

Q. By whom are you employed?

A. Continental Casualty Company.

Q. In what capacity?

A. Superintendent of surety underwriting and claims.

Q. In such capacity, have the Duby matters in connection with this Civil Aeronautics job out at Bow Lake passed through your hands?

A. Yes, sir.

Q. You are familiar with that contract?

A. Yes, sir.

Q. And with all happenings thereunder?

A. Yes, sir.

Q. In connection with that contract, Mr. Bruce, did Continental Casualty Company issue bonds for Mr. Duby as principal? A. They did.

Q. And what were the kind and types of bonds issued? A. Performance and payment bonds.

Q. Will you briefly describe the difference between a performance bond and a payment bond?

A. The performance bond is a bond guaranteeing the [128] performance of the contract itself in accordance with its terms, usually for 50 per cent of the contract price, I believe it was in this case. The payment bond is a bond running to the United States for the benefit of labor and material men.

Q. I will ask you whether or not under the payment bond issued to Mr. Duby in connection with

(Testimony of Warner M. Bruce.)

this Bow Lake contract, whether or not Continental Casualty Company did or was required to pay the full amount of that bond into the registry of this Court?

A. The Continental Casualty Company paid the entire amount of the payment bond into the registry of this Court for the purpose of taking care of the labor and material claims that might be established against it.

(Clerk's file 1294 marked Defendant's Exhibit A-2 for identification.)

Q. There is placed in front of you an exhibit marked Defendant's Exhibit A-2 for identification, which is the Clerk of the Court's file in Cause No. 1294, which action was an interpleader action brought by Continental Casualty Company against all labor and material claimants. Is that the action in which Continental paid the full amount of its bond into this Court?

A. Yes, that is correct.

Mr. Belcher: I would like to inquire whether the [129] United States was a party to that action.

Mr. Skeel: They were not, and this is not offered in any manner in connection with the plaintiff's suit here, but only as between the defendant Continental Casualty Company and the defendant Duby, bearing only on the bankruptcy of the defendant Duby. Defendant's Exhibit A-2 is offered in evidence as against defendant Duby only.

The Court: It is admitted.

(Testimony of Warner M. Bruce.)

(Defendant's Exhibit A-2 received in evidence.)

Q. (By Mr. Skeel): Mr. Bruce, I will ask you what is the first time that defendant Continental Casualty Company had any knowledge or notice of any kind of the claim of the United States that the United States Government was making a claim against either Mr. Duby or Continental Casualty Company for delay in the performance of this job?

A. The first notice we had of such a claim was in the form of a letter from the Government to us at our Seattle office, dated September 11, 1946.

Q. I will ask the bailiff to hand you the letter to which you refer, which is Plaintiff's Exhibit 18 (b). Is that the letter to which you were referring?

A. That is the letter to which I referred.

Q. And that is the first notice or knowledge that [130] Continental Casualty Company had that the United States Government was making claim for delay in the performance of Mr. Duby's contract?

A. That is the first notice we received of the claim for delay or anything else.

Q. There has also been handed you Plaintiff's Exhibit 6, which is correspondence—which constitutes two letters, one a letter from yourself to the United States Government, and the other their reply, and I will ask you to state what those letters represent?

(Testimony of Warner M. Bruce.)

A. A letter of March 6, 1945, signed by myself and addressed to the Department of Commerce, Civil Aeronautics Administration, Seattle, was in reference to the Pat Duby contract. Do you wish me to read it?

Q. No. I will ask you if at that time, the date of the letter you now have in your hand, Plaintiff's Exhibit 6, Continental Casualty Company had any knowledge or intimation or notice of any kind that the United States Government was making any claim as a result of delay of Mr. Duby in the performance of his contract?

A. We had no knowledge or notice of that at that time.

Q. And it wasn't until the September 11, 1946, letter that Continental was advised of such claim?

A. That is correct. There are three letters here, by the way. [131]

(Claim of Continental Casualty marked Defendant's Exhibit A-3 for identification.)

Q. Mr. Bruce, there is handed to you Defendant's Exhibit A-3, so marked for identification, which is a certified copy of the claim of Continental Casualty Company as filed in the Duby bankruptcy. I will ask you what that claim was seeking recovery for, what moneys?

A. That claim sought to recover the amount that we had paid into court under the payment bond for the payment of the proved claims of the labor and material claimants on this particular contract.

(Testimony of Warner M. Bruce.)

Q. I will ask you if at the time of signing that claim in the Doby bankruptcy, if you knew or had any knowledge or any intimation of any claim by the United States Government against Continental Casualty Company for damages resulting from delay in the performance of the Doby contract?

A. We had no such notice. This antedated the other, the claim, by some time.

Mr. Skeel: I will ask that Defendant's Exhibit A-3 be admitted.

Mr. Belcher: As far as the United States is concerned, if your Honor please, we object to it on the same grounds.

The Court: Do you offer it against the plaintiff as well as against Doby? [132]

Mr. Skeel: As a matter of fact, your Honor, if the entire bankruptcy file is in evidence, then that claim is already admitted in evidence. I merely had the clerk prepare a certified copy when I was preparing this case for trial.

The Court: Plaintiff's Exhibit 11 is supposed to contain the bankruptcy proceedings in this court. Is that the one in which you would expect to find this claim listed, among other claims?

Mr. Skeel: Yes, your Honor. I was just pointing out that the one I am offering now is in effect already admitted as an exhibit in 11, but I merely thought it proper procedure to introduce the exhibit separately and not as a bulk file.

The Court: Is there any objection?

Mr. Belcher: No objection.

(Testimony of Warner M. Bruce.)

The Court: Defendant's Exhibit A-3 is now admitted.

(Defendant's Exhibit A-3 received in evidence.)

Mr. Skeel: No further questions.

The Court: Are there any questions by the defendant Duby's counsel?

Mr. Parrott: No, your Honor.

The Court: Are there any questions by plaintiff's counsel of this witness? [133]

Cross-Examination

By Mr. Belcher:

Q. I understood you to say, Mr. Bruce, that the first notice that the Continental Casualty had of any claim of the United States for delay was in 1946?

A. The letter of September 11, 1946, is the only one I have a record of.

Q. Under what provision of the contract do you claim that notice to you was necessary?

Mr. Skeel: I object to that, if your Honor please, as calling for a conclusion.

Mr. Belcher: I would like somebody to point out to me some provision of the contract that says we must notify the surety.

The Court: The objection is overruled. The witness may answer, if he can.

A. I am not familiar with the terms of the con-

(Testimony of Warner M. Bruce.)

tract that might or might not require notice. I merely state that the first notice I received of the claim was on September 11, 1946.

Q. Is it customary for your company on a performance bond not to keep in contact with your principal to determine whether or not he is fulfilling the terms of his contract?

A. It would be, if not impossible——

Q. You can answer the question without any explanation. [134] You can explain later.

The Court: Answer the question yes or no. If it requires explanation, that is another matter.

The Witness: I would have to say no, but I would have to qualify it.

The Court: State what you think is necessary qualification to make your answer true and correct.

The Witness: Ordinarily we send out a form of status report on contracts to the owner or obligor thereupon and those are completed and sent back to us. We might, if that indicated something that called our attention, we might then consult our principal. It would be impractical for a surety company, with the thousands of bonds they write, to consult their principal every time and keep in touch with every contract as it proceeded.

Q. Calling your attention to Plaintiff's Exhibit 3, the document where that exhibit is open shows what?

A. The contract—are you referring to the performance bond, or what part of it?

Q. Is that the performance bond?

(Testimony of Warner M. Bruce.)

A. It looks very much like it.

Q. Well, do you know the gentleman's signature who was authorized by your company to execute it?

A. It is signed by myself. [135]

Q. Signed by you? A. That is right.

Q. And it is attached to and made a part of the contract with Duby, is it not?

A. I think it is.

Q. And under the terms of that performance bond, you agreed to perform the work and be bound by all the conditions that Duby was bound by, didn't you?

A. We agreed—we guaranteed the performance of the contract under the terms of the contract and bond.

Q. Including the provisions of Article 9 of the contract, delays and damages? You stipulated, did you not, that for each calendar day's delay Duby and yourself would be bound to pay the United States \$20 per day?

A. We guaranteed the performance of the contract, whatever its terms may be.

Q. And all of the conditions? You made no exceptions, did you?

A. The form of bond is our guarantee.

Q. And with full knowledge of the fact that this work was to be completed within 30 days, when, in fact, it was not completed for 133 days, do you want the Court to understand that you didn't make any inquiry as to whether it had been completed or not

(Testimony of Warner M. Bruce.)

in the time it was supposed to have been [136] completed?

A. Many times there are conditions which entitle the contractor to an extension, and although these contracts have liquidated damages clauses, my experience has been that in very few cases are they invoked against the contractor. The Government could have held out the money from the estimates and protected themselves and protected the surety, because there were estimates paid a long time after this so-called delay started. That was what we objected to. We had no notice within time in which we could protect ourselves at all, not until a year after the contract had been completed, accepted, a year and a half.

Mr. Belcher: I think that is all.

Redirect Examination

By Mr. Skeel:

Q. As a matter of fact, in Plaintiff's Exhibit 6 you requested the Government to withhold funds, did you not?

A. As early as March, 1945, because of understanding that the contractor was having difficulty in paying his bills and that he was going to be charged with liquidated damages, I requested that it be withheld. The Government made no definite reply to that, but asked me why I wished to have it withheld, and I advised them in the letter which is in evidence and gave them the bills which were outstanding, which were more than the amount of

(Testimony of Warner M. Bruce.)

the bond, and they [137] advised at the time that the contractor had made a request for additional compensation and the matter was being considered, and we had no thought at all that there was any chance of any liquidated damages being imposed upon him under those circumstances.

Mr. Skeel: No further questions.

Recross-Examination

By Mr. Belcher:

Q. You knew, didn't you, that the Government did withhold \$298?

A. I didn't know what they withheld until I got this final claim. I didn't know how much they had paid the contractor. Apparently they paid him money that they should have withheld, if they are claiming liquidated damages.

Q. At the time you wrote this performance bond, had you been fully informed with respect to Exhibit 1, which was the proposal that Duby bid on?

A. We actually never saw the proposal, as we do not see in most instances. However, as you say, we will be charged with knowledge of it, no doubt.

Q. The contract by its terms make the proposal a part of the contract, doesn't it?

A. Very true.

Q. And it is the proposal that fixes the sum of liquidated damages at the rate of \$20 per day for each [138] calendar day's delay?

A. Although I do not believe I had any definite

(Testimony of Warner M. Bruce.)

knowledge at the time of just what the liquidated damages were, I do know that in most of these Government contracts there is some liquidated damages stated; although not acted upon in most instances, they are stated in the contract.

Q. What did you say, "not acted upon in most cases"? A. I mean just that.

Q. How many cases can you tell me where there has been delay where the Government has not insisted upon strict compliance with the conditions of the contract?

A. I couldn't cite you any individual cases, but I know of very few cases where liquidated damages have been charged against a contractor which we had to pay.

Q. Why did you make the statement that the Government didn't insist upon these things in all cases? I asked you for a specific instance.

A. In my opinion, they do not.

Q. I beg your pardon?

A. In my opinion, liquidated damages are not collected in all cases where the contract provides that there could be liquidated damages.

Q. Can you cite me a particular one, a single, solitary instance where you were on the performance bond where the Government did not insist upon the provisions of the [139] liquidated damages clause?

A. I undoubtedly could find plenty in my files, but I can't give you a case here today.

Q. I am not asking you that.

(Testimony of Warner M. Bruce.)

A. No, I can't here today, without my files.

Mr. Belcher: That is all.

The Court: Any further interrogation of this witness?

Mr. Skeel: No, your Honor.

The Court: You may step down. Call the next witness.

Mr. Skeel: Defendant Continental Casualty Company rests.

The Court: Is there any rebuttal?

Mr. Belcher: Yes, your Honor. It will be very short. Mr. Hall.

The Court: Resume the stand, Mr. Hall. You have already been sworn.

LESTER HALL

recalled as a witness by and on behalf of plaintiff, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Belcher:

Q. For the benefit of the Court and counsel, I will ask you to state whether or not this particular project could [140] have been executed under the most favorable conditions without the use of a clam-shell?

A. In my opinion, not.

Q. Could it have been executed by a bulldozer?

A. Not alone, no.

Q. What is meant by the term side casting of material?

(Testimony of Lester Hall.)

A. Well, on this particular job there was——
The Court: Read the question.

(Last question read by reporter.)

The Court: Think of it very carefully.

Q. As applied to this particular job, I will put it that way.

A. The side casting is the picking up of material and casting it to one side or the other of the machine without moving the machine.

Q. Could that be done with a bulldozer?

A. No.

Q. What kind of machine is used?

A. Either a clamshell or a dragline.

Q. What type of equipment did Duby have on this job?

A. He had, I think, a clamshell and possibly a dragline bucket at times, I am not sure.

Q. From the beginning, the inception of the work, or later on?

A. I think he had no equipment on the work for two or [141] three weeks after the work started.

Q. What was he doing?

A. He had a carpenter forming prefabricated forms for the various structures.

Q. That is for what purpose, pouring cement?

A. Yes, pouring concrete.

Q. The big work that was to be done here, Mr. Hall, was the construction of culverts and what?

A. There was one twin box culvert and four

(Testimony of Lester Hall.)

check dams, in addition to cleaning out the stream channel.

Q. What is the purpose of the check dams?

A. It was to slow the velocity of the water up.

Q. So that one bidding upon this job for this construction would know, would he not, that from the very nature of the construction he was going to run into water?

A. Well, the culvert was a twin box culvert with a twin 4 by 7 opening, which accommodates a lot of water.

Mr. Belcher: I think that is all.

Cross-Examination

By Mr. Parrott:

Q. What kind of place was it where this work was being done? Just describe it.

A. It was a stream channel with rather flat surroundings.

Q. When did you first see it?

A. Oh, about 1942. [142]

Q. How did you happen to be out there?

A. I was making a reconnaissance survey for the Civil Aeronautics.

Q. Who decided where this work was going to be done?

A. I don't know. This work was not even contemplated at that time.

Q. When did you see it again after 1942?

A. Off and on.

(Testimony of Lester Hall.)

Q. What would you be down there for?

A. We constructed an open ditch starting in 1943, I believe.

Q. Where was that?

A. This same channel, drainage channel.

Q. You ditched it a little bit, is that what you mean?

A. That is right.

Q. How much of a ditch was that?

A. I think it was about a six-foot bottom width and with one to one side slopes, varied in depth from two to six feet.

Q. Six feet on the high side and two feet on the low side, is that what you mean?

A. No, different places on the drainage canal.

Q. Some places it will be a little bit rolling, some places the ditch is two feet deep and some places six feet deep; is that what you mean? [143]

A. That is right.

Q. What time of year was that?

A. I think it was carried on during a good share of the year of 1943.

Q. It took all that summer to do that, did it?

A. That and other work.

Q. Coming up to 1944, when were you first down there in 1944?

A. That I don't recall, either. I was down there periodically.

Q. When do you think you were down there?

A. I was down there at the time that—before the contract for this particular work was let to show bidders over the site. I don't recall the date.

(Testimony of Lester Hall.)

Q. What did the bidders say about the conditions incident to the doing of the work when you took them down there?

A. I don't recall that they said anything.

Q. Isn't it customary when you are showing people over a job like that for the prospective bidders to express their opinion about the terrain and the conditions existing?

A. No, that is strictly forbidden.

Q. You can't talk about it, is that right?

A. That is right.

Q. Who was it made the highest bid, according to the record in the case? [144]

A. That I don't know.

Mr. Belcher: That is immaterial, if your Honor please.

The Court: Overruled.

Q. Who was it made the biggest bid on that job?

A. I don't know.

Q. Will you please look and see?

Mr. Belcher: This witness has testified to nothing of that character on his direct examination, if your Honor please. I submit it is improper cross-examination.

The Court: What is it in direct that opens up this line of inquiry?

Mr. Parrott: I will withdraw the question.

Q. What time was it during the year 1944 that you were down there showing the layout to the bidders?

A. I presume it was August or September.

(Testimony of Lester Hall.)

Q. What were the conditions there at that time as far as the water and terrain were concerned?

A. There was very little water flowing in the channel. The ground conditions were soft and wet in places, mushy.

Q. They would have to sink down how deep, you say, in this ditch? Your testimony was the ground there was comparatively level, but they would have to dig down in the ditch. How deep would they have to dig? A. For what?

Q. In order to put in these frames, etc. [145]

Mr. Belcher: I don't know that there is any testimony on that, if your Honor please, that anybody asked him to dig anywhere. It seems to me this is pretty far afield.

Mr. Parrott: He testified as to the size of a box in his testimony this afternoon, and I want to get some idea of about how deep you had to go down in the dirt, what depth of dirt would you have to remove.

The Court: In order to lay that size box?

Mr. Parrott: That is correct.

Mr. Belcher: He has testified to that, your Honor.

Mr. Parrott: No, he hasn't.

The Court: The objection is overruled. You may answer the question, if you know.

The Witness: I think that about three or four feet in the bottom of the stream channel; on the side, probably seven feet, those parts.

Q. On which side?

(Testimony of Lester Hall.)

A. For parts of the structure would have been out on the banks, would have been about seven feet below the general terrain.

Q. Why couldn't a man do that with a shovel?

A. Because the structures were so small that you couldn't get a shovel in there to do it.

Q. What structure do you mean? [146]

The Court: The structures intended to be built, the concrete structures?

The Witness: Yes.

Q. The concrete wasn't in yet, was it?

A. No, but there was specifications that the concrete structure would be poured against undisturbed earth.

Q. How could you get a clamshell bucket down into a place where a man couldn't get a hand shovel?

A. I thought you were speaking of a power shovel.

Q. No.

A. Yes, this could be excavated with a hand shovel.

Q. The way this situation looked when Mr. Duby made this offer, the way it looked at that time, if it had stayed that way until this contract would have been completed a man could have done that with a hand shovel, couldn't he?

A. That part of the construction, yes, but no sane man would have tried to take and excavate the stream channel with a hand shovel.

Q. Ordinarily, how would you get that out?

A. As I stated before.

(Testimony of Lester Hall.)

Q. How much would it have cost to have diverted the water?

Mr. Belcher: That is immaterial, if your Honor please. I can't see that that has any bearing on this case, how much it would cost to do that.

Q. It would have been practical, would it not, to have [147] diverted the water at that place out of the channel?

Mr. Belcher: That is objected to as immaterial. We are getting far afield.

Mr. Parrott: He said you had to have a clam-shell bucket to do that job, and I haven't heard anything in the questions I asked and answers given that indicated you had to have a clamshell.

The Court: The objection is overruled. Read the question.

(Last question read by reporter.)

A. That I don't know. That would take a little study and estimate, I think.

Q. At the time Mr. Doby looked at the terrain, looked the place over, and at the time he made the bid, could you as far as the water that was in evidence there at that time—would it have been any engineering problem to have diverted the water at a very small expense?

Mr. Belcher: That is objected to as immaterial, if you Honor please. Here is a definite, fixed contract. We are trying that, we are not trying the question of the advisability of letting this contract in the first place.

(Testimony of Lester Hall.)

Mr. Parrott: We have been trying this case, as I understand it, on the theory that under the conditions as existed, as Duby had a reasonable right to anticipate [148] they would be, it could be done at a certain cost, a certain kind of equipment, and your position is, according to the testimony of this witness, that it could only be done by heavy equipment like a clamshell bucket or cherrypicker or whatever they call it.

Mr. Belcher: Counsel misunderstood. Mr. Duby distinctly testified—this is rebuttal—Mr. Duby testified that he was forced to go to the additional expense, because of the difficulties which he ran into, of using a clamshell bucket. My purpose here was to rebut that testimony by this witness, that he had a clamshell bucket there at all times.

The Court: The cross-examiner has a right to inquire into the subject matter of the direct examination, no matter whether the direct examination was by way of rebuttal or by way of plaintiff's case in chief, has he not? I do not see that the circumstance of rebuttal limits the right of cross-examination insofar as the cross-examination is already confined to the subject matter inquired of in examination on direct. The objection is overruled. Try not to cover the same ground if you have covered it with this witness when the plaintiff called this witness as part of plaintiff's case in chief. Try not to try the case all over again today to the extent it was tried on April 23rd. [149]

Q. Read the question, please.

(Testimony of Lester Hall.)

(Last question read by reporter.)

The Court: If you know.

A. It wouldn't appear to have been a terrifically expense provision to have made.

Q. What was the ratio of fall per hundred feet of the terrain at that spot?

A. The ratio of—could I have that question again?

Q. The ratio of fall per hundred feet.

A. I don't recall. I think the plans there would show that.

Mr. Parrott: I think that is all.

Mr. Skeel: No questions.

Mr. Belcher: Nothing further.

The Court: You may be excused from the stand. Call the next witness.

Mr. Belcher: The Government rests.

The Court: Is there any further testimony to be taken on behalf of anyone?

Mr. Skeel: No, your Honor.

The Court: Do both defendants rest?

Mr. Parrott: Yes, your Honor.

Mr. Skeel: Defendant Continental rests.

The Court: Court will be at recess for five minutes.

(Recess.) [150]

(Closing arguments made by counsel.)

The Court: The case is continued for two weeks for the purpose of further argument, and in the

meantime I ask all counsel in the case to file briefs touching the points that have been argued today and the questions that have been raised. I wish counsel to show the Court the authorities. It will have to be June 11, at 11 o'clock in the forenoon, and I ask all of you before Friday preceding that date to have on file your briefs in this case, discussing and showing the authorities supporting the various contentions in this case.

Mr. Belcher: Does your Honor desire the entire matter briefed?

The Court: Yes, everything that is to be argued, everything that has any bearing on the question of who should recover and who should not and why.

(At 4:25 o'clock p.m., May 25, 1951, proceedings adjourned until 11:00 o'clock a.m., June 11, 1951.)

June 11, 1951—11:00 A.M.

Mr. Belcher: If your Honor please, I have left with the clerk a certified copy of Exhibit 8, which your Honor [151] rejected because it was on a black background. I have supplied a white background. May I substitute that?

The Court: Is there any objection?

Mr. Skeel: No objection, your Honor.

The Court: It was received in evidence as Plaintiff's Exhibit 8.

Mr. Belcher: Yes, your Honor.

The Court: You now ask that this white background be substituted?

Mr. Belcher: Yes, your Honor.

The Court: That request is granted. It is so ordered, and the original paper initially marked Exhibit 8 will now be returned to counsel who offered it.

Mr. Belcher: For the purpose of clarity, may that be marked Exhibit 8? I have referred to it all the way through my brief as Exhibit 8. That is the way it was originally offered, your Honor.

The Court: Is there any objection to counsel's request from opposing counsel?

Mr. Skeel: No, your Honor.

The Court: That request is granted, and the Court's previous notation and order that the offer of that exhibit was denied because it was presented in the form of a black photostat, and the Court's order withdrawing that exhibit and returning it to counsel who produced it, are [152] each and all stricken and the Court does now order that the clerk receive the substituted white background copy of what was that identified exhibit, and the Court directs the clerk to place on this white background copy the notation Plaintiff's Exhibit 8 and the Court does now admit that exhibit in evidence as Plaintiff's Exhibit 8. Does that take care of it?

Mr. Belcher: Yes, your Honor, thank you.

(Plaintiff's Exhibit 8 received in evidence.)

(Arguments made by counsel.)

Court's Decision

The Court: It is the opinion and decision of the Court that the claim sued for by the plaintiff is for liquidated damages and not a penalty; that the claim is one which is provable in bankruptcy.

That the discharge of the defendant Duby in bankruptcy was a discharge of the Government's claim direct against him, and for that reason the defendant Duby is not now liable to the plaintiff in any sum—because whatever claim the Government had against the defendant Duby was discharged by the discharge in his bankruptcy proceeding.

That as to the defendant Continental [153] Casualty Company, that defendant did have a contract obligation to indemnify the plaintiff against the nonpayment by the defendant Duby of such claim for liquidated damages, but that such defendant's third affirmative defense pleaded in paragraph I on page 5 of its answer under the evidence of this case is a complete defense against the plaintiff's asserted claim for such indemnity obligation of the defendant surety company, because the Court finds, concludes and decides that the evidence in this case establishes, by a preponderance thereof, that all the while the United States Government was claiming a breach of contract by the defendant Duby, and without notifying the defendant Continental Casualty Company, the surety, of such breach or delay, the plaintiff continued after such alleged breach to make progress payments to the defendant Duby of the moneys earned under the contract and which

were in the hands of the plaintiff, and that by reason of the making by plaintiff of such progress payments, the plaintiff gave up the security which it then had against the defendant Duby which the plaintiff could have applied on account of any liquidated damage claim which then was accruing or which thereafter did accrue, and that by reason thereof the defendant Continental Casualty Company was released from its indemnity contract obligation to the plaintiff. [154]

That in view of all the evidence in this case and from a preponderance thereof, the Court finds, concludes and decides that the plaintiff take nothing against either of these defendants on account of plaintiff's complaint herein, and that plaintiff's complaint be dismissed without costs, and that each party litigant pay its own costs herein [155] sustained.

Certificate

I, Patricia Stewart, do hereby certify that I am official court reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ PATRICIA STEWART,
Official Court Reporter.

[Endorsed]: Filed October 15, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision I of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith all of the original papers in the file dealing with the above-entitled action, and that the same constitute the complete record on file in said cause. The papers herewith transmitted, together with Plaintiff's Exhibits numbered 1 to 18 inclusive, and Defendants' Exhibits numbered A-1 to A-3 inclusive, constitute the record on appeal from the Judgment of Dismissal Filed July 16, 1951, to the United States Court of Appeals for the Ninth Circuit, and are identified as follows:

1. Complaint, filed Mar. 15, 1949.
2. Praecept for summons, filed Mar. 15, 1949.
3. Marshal's Return on Summons, Duby, filed Mar. 25, 1949.
4. Appearance, Deft. Continental Cas. Co., filed April 4, 1949.
5. Marshal's Return on Summons, Con. Cas. Co., filed May 3, 1949.
6. Answer of Defendant, Continental Casualty Co., filed July 12, 1950.

7. Answer and Affirmative Defenses of Pat Duby, filed July 14, 1950.

8. Answer of Pat Duby to Cross-Complaint of Con. Cas. Co., filed July 20, 1950.

9. Reply of Plaintiff to Answer of Pat Duby, filed Aug. 17, 1950.

10. Reply to Answer of Continental Cas. Co., filed Aug. 17, 1950.

11. Motion Con. Cas. Co. to Require Plaintiff to Produce Documents, filed April 12, 1951.

12. Notice of Hearing Motion, filed April 12, 1951.

13. Praecipe for Subpoena, (Hall), behalf Government, filed April 20, 1951.

14. Marshal's Return on subpoena, Hall, filed April 23, 1951.

15. Memorandum of Authorities of Con. Cas. Co., filed May 25, 1951.

16. Memorandum on Behalf of Defendant Duby, filed May 25, 1951.

17. Memorandum Submitted by Defendant Pat Duby, filed June 6, 1951.

18. Supplemental Memorandum of Authorities of Con. Cas. Co., filed June 7, 1951.

19. Plaintiff's Memorandum, filed June 8, 1951.

20. Findings of Fact and Conclusions of Law, filed July 16, 1951.

21. Judgment of Dismissal, filed July 16, 1951.

22. Notice of Appeal, filed Sept. 11, 1951.

23. Court Reporter's Transcript of Proceedings at Trial, filed Oct. 15, 1951.

24. Order to Transmit all Exhibits to Court of Appeals, filed Oct. 15, 1951.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparation of the record on appeal herein on behalf of appellant, to-wit: Filing fee, Notice of Appeal, \$5.00, and that this amount has not been paid to me for the reason that the appeal in this cause is being prosecuted by the United States Government.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 16th day of October, 1951.

[Seal] MILLARD P. THOMAS,
Clerk,

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 13138. United States Court of Appeals for the Ninth Circuit, United States of America, Appellant, vs. Pat Duby, Doing Business as Pat Duby Company and Continental Casualty Company, a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed October 18, 1951.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13138

UNITED STATES OF AMERICA,

Appellant,

vs.

PAT DUBY, Doing Business as Pat Duby Com-
pany,

Defendant,

CONTINENTAL CASUALTY COMPANY, a Cor-
poration,

Defendant Respondent.

CONCISE STATEMENT OF POINTS ON
WHICH APPELLANT INTENDS TO RELY
AND DESIGNATION OF RECORD TO BE
PRINTED

Comes now appellant United States of America and submits the following concise statement of points on which appellant intends to rely on this appeal.

I.

This appeal is from the judgment of dismissal rendered in favor of respondent Continental Casualty Company only, as surety upon the performance bond of Pat Duby Company. No relief is intended to be sought or will be sought from the defendant Pat Duby, d/h/a Pat Duby Company.

II.

The errors relied upon by appellant are:

(a) Finding of Fact numbered XIII to the effect *to the effect* that respondent Continental Casualty Company had no notice of appellant's (plaintiff's) claim for liquidated damages resulting from delay in the performance of the contract by said Doby until receipt of letter dated September 11, 1946, from the General Accounting Office of the United States.

(b) Conclusion of Law numbered IV, holding defendant (respondent) Continental Casualty Company is entitled to a judgment of dismissal, based upon evidence produced at the trial which constitutes a complete defense under its Third Affirmative defense.

Appellant hereby adopts its designation as filed in the District Court; designates the following from the record to be printed in the transcript:

1. The entire transcript of the proceedings.
2. All of the pleadings.
3. The Findings of Fact, Conclusions of Law and Judgment of dismissal.
4. Notice of appeal.

5. This designation.
6. Certificate of clerk.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Assistant U. S. Attorney.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

/s/ WILLARD E. SKEEL,
Attorneys for Continental
Casualty Co.

Receipt of copy acknowledged.

[Endorsed]: Filed November 1, 1951.

No. 13138

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

PAT DUBY, doing business as
Pat Duby Company, and Continental
Casualty Company, a corporation,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney

OFFICE AND POST OFFICE ADDRESS:
1017 U. S. COURT HOUSE
SEATTLE 4, WASHINGTON

FILED

FEB 18 1952

PAUL B. O'BRIEN

No. 13138

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

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MOTION TO DISMISS APPEAL AS TO
PAT DUBY COMPANY

Appellant moves to dismiss the appeal herein as to Pat Duby, doing business as Pat Duby Company, for the reason and upon the ground that the only relief herein sought is against the surety on its performance bond, the said Duby having been discharged in bankruptcy.

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney



IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,
vs.

PAT DUBY, doing business as
Pat Duby Company, and Continental
Casualty Company, a corporation,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

JURISDICTION

The jurisdiction of the District Court is conferred by Section 1345, Title 28, U.S.C., and of this Court by Sec. 1291, Title 28, U.S.C.

STATEMENT OF THE CASE

The action was one for the recovery of liquidated damages as agreed to in a written contract between Civil Aeronautics Authority and Pat Duby Company for delay in the completion of the construction of concrete check dams and a twin concrete box culvert at the Seattle-Tacoma Airport in 1944. (Ex. 3)

Duby was awarded the contract on competitive bidding for the sum of \$6,602.70.

By the terms of the contract, work was to be commenced within five days after notice to proceed, which was given October 6, 1944. (Ex. 5)

The work was to be completed in thirty days, but the time was extended an additional sixteen days. The work consumed a total of one hundred seventy-nine days, or one hundred thirty-three days in excess of the time fixed in the contract, the date of completion being April 2, 1945.

The terms of the proposal (Ex. 1) numbered 7-45-109 per H. *inter alia* provided:

“LIQUIDATED DAMAGES: Subject to the provisions of Article 9 of the contract, the contractor shall be charged liquidated damages for each day of delay in completion of the schedule as follows:

Schedule 1—\$20.00 per calendar day.”

Appellee Continental Casualty Company was surety on Duby's performance bond. (Ex. 3) In the final settlement with Duby the Government withheld the sum of \$979.82.

At the rate agreed upon for liquidated damages for delay in completion, to wit: \$20.00 per day for 133 days amounts to \$2660.00. Deducting the amount withheld in final settlement, leaves a balance of \$1680.18, which is the amount sued for.

Article 9 of the contract (Ex. 3) referred to in the proposal (Ex. 1) reads:

"Delays, damages. If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is terminated, the Government may take possession of and utilize in completing the work such materials, appliances and plant as may be on the site of the work and necessary therefor.

"If the Government does not terminate the right of the contractor to proceed, the contractor

shall continue the work, in which event it will be impossible to determine the actual damages for the delay and in lieu thereof, the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted, the amount set forth in the specifications or accompanying papers, and the contractor and his sureties shall be liable for the amount thereof
* * * .”

There is a proviso which relieves the contractor “due to unforeseen causes beyond the control and without the fault or negligence of the contractor including, but not restricted to acts of God, or the public enemy, acts of the Government, acts of another contractor, fires, floods and unusually severe weather.”

There were no unforeseen causes beyond the control of the contractor. The contractor was negligent and incompetent.

Had the contractor acted diligently, he could have completed the work in the allotted time of forty-six days, which included the sixteen day extension, which would have expired in November, 1944, but because of his lack of diligence he ran into the usual rainy season so prevalent on Puget Sound, as so clearly shown by the progress he made in the first month of his work. There was nothing unusual about the weather, except that the rains naturally hampered

his work, which he did not complete until April, 1945.

Duby was thereafter adjudicated a bankrupt, having filed a voluntary petition therefor June 30, 1945.

The Government did not file a claim in the bankruptcy proceeding, but looked to the surety, Continental Casualty Company, on its performance bond. (R. 109-110)

After issue joined a trial was had in the District Court for the Western District of Washington, Northern Division, and resulted in findings of fact, conclusions of law and judgment in favor of Duby and his surety, Continental Casualty Company.

This appeal concerns only the judgment rendered in favor of Continental Casualty Company and no relief is herein sought against the judgment in favor of Duby.

THE EVIDENCE

The evidence in support of the complaint consists mainly of documents, to-wit:

- Ex. 1 Call for bids. (R. 47)
- " 2 Plans and specifications. (R. 48)
- " 3 Contract. (R. 49)
- " 4 Letter of April 4, 1945. (R. 50)

- " 5 Letter of October 4, 1944. (R. 52-54)
- " 6 Correspondence with surety. (R. 62)
- " 7 Letter of August 11, 1945. (R. 63-68)
- " 8 Certified copy of settlement. (R. 64, 68, 117)
- " 9 Photostatic copy of letter of October 31, 1944. (R. 69-70)
- " 10 Letter to Duby March 5, 1945. (R. 78-79)
- " 11 Bankruptcy file Cause No. 37366. (R. 111)
- " 12 Photostatic copy letter Oct. 4, 1944. (R. 112)
- " 13 Photostatic copy of letter Jan. 16, 1945. (R. 113)
- " 14 Photostatic copy of letter Jan. 29, 1945. (R. 113-114)
- " 15 Photostatic copies of letters Feb., Mar., Apr. 1945 (R. 115)
- " 16 Photostatic copy of letter May 10, 1945. (R. 115)
- " 17 Photostatic copy of letter by Mr. Parrott. (R. 116)
- " 18 Photostatic copy of letters affecting C.C.C. (R. 116-118)

The defendant Duby testified (R. 135) that he received a letter dated October 31, 1944, from Civil Aeronautics Authority complaining of the progress, in which the Authority said "*It is further pointed out that due to the nature of the work, its completion becomes increasingly difficult as the season advances,*

and that the Government's interest requires that construction *be completed at the earliest possible time.*"

At the conclusion of the evidence, the court took the matter under advisement, requesting briefs from all parties, which were supplied, and thereafter rendered its oral decision, carrying the same into its findings of fact, conclusions of law and judgment, which were entered July 16, 1951. (R 31-41)

Notice of appeal was timely filed and the matter comes before this court upon that appeal only in so far as Continental Casualty Company, the surety is concerned.

QUESTIONS ON APPEAL

We contend the District Court erred in the following particulars, to-wit:

I.

In adopting Finding XII to the effect that appellee Continental Casualty Company had no notice of appellant's claim for liquidated damages resulting from delay in the performance of the contract by said Duby until receipt of letter dated September 11, 1946, from the General Accounting Office of the United States.

II.

In adopting Conclusion of Law numbered IV holding appellee Continental Casualty Company entitled to a judgment of dismissal.

ARGUMENT AND AUTHORITIES

Finding XII reads:

“That defendant, Continental Casualty Company, had no notice of plaintiff’s intended claim for liquidated damages resulting from delay in the performance of the contract by said Duby until receipt of letter dated September 11, 1946, from the General Accounting Office of the United States and therefore the said Continental Casualty Company had no opportunity to file a claim covering the government’s claim for liquidated damages in the H. L. Duby bankruptcy proceeding.”

This particular finding is a mixed finding of fact and conclusion of law and is contrary to the evidence. Exhibit 6 (R. 62) consists of three letters, two of which are on the letterhead of appellee Continental Casualty Company dated in April, 1945, showing notice to appellee, contrary to Finding XII. Further, the appellee was, as surety, a party to the contract, Ex. 3, and had full knowledge of all of its provisions, including the provision for liquidated damages provided for in Article 9. One of the letters constituting Ex. 6 (dated in March, 1945), (R. 164). In response to a question on re-direct examination by its own counsel, the record at p. 164 shows the following in the examination of Mr. Bruce, who signed the performance bond:

BY MR. SKEEL:

"Q. As a matter of fact, in plaintiff's Exhibit 6, you requested the Government to withhold funds, did you not?

A. As early as March, 1945, because of understanding that the contractor was having difficulty in paying his bills, and *that he was going to be charged with liquidated damages, I requested that it be withheld.* The Government made no definite reply to that, but asked me why I wished to have it withheld, and I advised them in the letter which is in evidence, and gave them the bills which were outstanding, which were more than the amount of the bond, and they advised at the time that the contractor had made a request for additional compensation and the matter was being considered, and we had no thought at all that there was any chance of any liquidated damages being imposed upon him under those circumstances." (R. 65) (Italics ours)

Article 15 of the contract (Ex. 3) carries this provision:

"*Disputes.* Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

The first real complaint made by Duby about the conditions existing at the site is contained in his letter to Doyle Affleck, Resident Engineer, dated January 16, 1945, (Ex. 13) (R. 113) more than two months after the time for completion of the work had expired. To which Mr. Affleck replied under date of January 22, 1945. (Ex. 14 - R. 113)

The decision of Mr. Affleck, under the terms of Article 15 of the contract (Ex. 3) became final and there is no evidence in the record that an appeal was taken by Duby to the Secretary of Commerce, so that that decision became final.

Exhibit 5 is a letter dated October 4, 1944, accepting Duby's bid of \$6,512.70. With this letter there was transmitted in quadruplicate the formal contract (Ex. 3) as well as forms of performance and payment bonds, a complete set of drawings and specifications. The letter concludes:

"You are hereby given notice to proceed effective October 6, 1944."

(This is duplicated by Ex. 12 which is a photostatic copy of the letter.)

Exhibit 6 consists of correspondence, the letters being dated March 6, 1945, from defendant Continental Casualty Co. to the General Accounting Of-

fice requesting the withholding of further payments to Duby, April 23, 1945, from Continental to General Accounting Office, specifying certain debts and a letter from the General Accounting Office to Continental.

Exhibit 7 is a letter dated August 11, 1945, from Deputy Commissioner to the Regional Administrator.

Exhibit 8 is a certified copy of account with Duby showing the balance due from Duby (this was refused admission in evidence because photostat is on black background. We have offered a substitute on white background.)

Exhibit 9 is a letter to Duby dated Oct. 31, 1944, complaining of no progress and threatening to exercise the right to take over.

Exhibit 10 is a letter dated March 5, 1945, from Hall (Engineer on the job) to Duby.

Exhibit 11 is Duby's bankruptcy file No. 37366.

Exhibit 12 is a photostat of Ex. 5.

Exhibit 13 is Affleck's letter dated January 16, 1945, to Duby deciding as contracting officer the claim which Duby made.

Exhibit 14 is a letter from Duby to Affleck dated January 20, 1945.

Exhibit 15(a) to 15(b) and 15(c) are letters from Duby to Mr. Wilson, Administrative Officer, complaining of extra expense due to difficulties encountered.

Exhibit 16 is a letter dated May 10, 1945, addressed originally to Mr. Howard Clark in care of Senator Magnuson, but changed to D. J. Wilson, containing a resume of the complaints which did not commence until January, 1945.

Exhibit 17 is Mr. Parrott's letter to the General Accounting Office demand on Duby.

Exhibit 18(a), 18(b) are letters from Continental Casualty Co. to General Accounting Office, and General Accounting Office to Continental dated, respectively, April 23, 1945, and September 11, 1946; *18(c)* is a letter dated October 9, 1946, from Continental to the General Accounting Office; *18(d)* is a letter dated April 25, 1947, from the Comptroller General to Continental.

These exhibits were supplemented by oral testimony of Engineers Wild (R. 45, 96, 103) and Hall (R. 73, 167, 169)

Wild testified to the preparation of the plans

and specifications, while Hall testified to the actual conditions at the site of the job.

Duby testified in his own behalf and claimed unprecedented rains from the time of the commencement of the job, (R. 120, 134, 138, 150) the quicksand and gravel formation and that he was required to have a clam shovel on the job constantly. (R. 105)

In rebuttal, Hall (R. 169) testified that the rainy season did not commence until the time for completion had expired, and even then it was not unusual. The burden was on Duby and he did not produce any witnesses to bear him out.

The provisions of the contract providing as it does for "liquidated damages" of \$20.00 per day for each day's delay in the completion of the project is definite and unambiguous and is binding on Duby and his surety.

The parties agreed in writing as to the amount per day Duby would be required to pay if there was delay and his surety can now be heard to say that plaintiff suffered no damages.

Six Companies v. Joint Highway Dist. No. 13,
(9 Cir.) 110 F. (2d) 621;

United States v. Bethlehem Steel Co., 205 U.S.
105.

The case of *Rispin v. Midnight Oil Co.* (9 Cir.) 291 F. 481, which will undoubtedly be relied on by Continental, is hardly in point here for the reason that that was an action between private parties, while here, the public interest is involved, it was a public contract, and an entirely different rule obtains in such cases.

U. S. v. Bethlehem Steel Co., 205 U.S. 105;
Maryland Dredging Co. v. U. S., 241 U.S. 184;
City of Redding v. U. S. F. & G. Co. (E.s.P.)
 19 F. Supp. 350;
Bankers Surety Co. v. Elkhorn R. Drainage Dist.
 (8 Cir.) 214 F. 342.

34 A.L.R. 1345, et seq. This provision is valid.

In Six Companies v. Joint Highway District No. 13, 110 F. (2d) 621 (9th Cir.) the court allowed recovery under a clause for liquidated damages quite similar to the article of the contract here involved. Judge Healy speaking for the court saying:

“Although a municipality, in its corporate capacity, may suffer no damage from delay in the completion of a public improvement, it may validly contract for liquidated damages for delay in contemplation of the inconvenience and loss which will flow to its inhabitants for whose benefit the improvement is intended and at whose cost it is built. Such is the rule applied in the cases generally.” (Citing the above cases)

While this case was reversed on certiorari on

the sole ground that the laws of the State of California provided that a stipulation in a construction contract for liquidated damages in case of delay in completion was inapplicable after abandonment of the work.

Six Companies of California v. Joint Highway Dist. No. 13, 311 U.S. 180 (rehearing denied 311 U.S. 730), such reversal does not affect the force of the authorities cited and relied upon by this court on the particular point with which we are dealing. The State of Washington does not have a law comparable to that of California considered in that case.

As applied to construction contracts of a public nature there is an instructive note in 34 A.L.R. p. 1343, in which is cited the case of *Bethlehem Steel Co.*, *supra*. The author says: (p. 1343)

“The principal point discussed in *Elliott Mach. Co. v. United States* (1908), 43 Ct. Cl. (Feb.) 232, *supra*, where recovery was permitted on a stipulation in the contract for the construction of a scow, providing for the payment of a specified amount for each day's delay in the completion thereof as damages which the contractee suffered as a consequence of the delay, notwithstanding that, because of conditions arising after the making of the contract, no actual damages were suffered as a consequence of the delay, was whether the stipulation was in fact one for liquidated damages or for a penalty, the conclusion on this point being that the language sufficiently indicated that the parties intended to liquidate

the damages in advance, and that the subject matter was proper to liquidate. No question was raised that the amount stipulated was recoverable regardless of whether actual damages were suffered, if the contract was, in fact, one for liquidated damages."

Article 9 of the contract here involved, in its language is taken from Sec. 1223 Appendix to Title 41, U.S.C.A. and will be found at p. 592 Public Contracts, of the paper covered volume (T. 40 and 41), 1951 supplementary pamphlet.

By the provisions of Section 269, Title 40, U.S.C.A. it is expressly provided that stipulations for "liquidated damages" in public contracts shall be "conclusive and binding upon all parties". That section reads:

"In all contracts entered into with the United States for the construction or repair of any public building or public work under the control of the Federal Works Agency, a stipulation shall be inserted for liquidated damages for delay * * * and in all suits commenced on any such contracts or on any bond given in connection therewith, it shall not be necessary for the United States, whether, plaintiff or defendant, to prove actual or specific damages sustained by the Government by reason of delays, but such stipulation for liquidated damages shall be conclusive and binding upon all parties."

Judge Yankwich, sitting in the Southern Division of the Western District of Washington had oc-

casion to pass on this section in connection with "liquidated damages" for delay in the construction of the post office building at Grant's Pass, Oregon, in the case of *Consolidated Engineering Co., Inc. v. United States*, 35 F. Supp. 980, where he said:

"The contract provided for the completion of the building within three hundred days after the date of the notice to proceed. There was a delay of seventy days. The contract and specifications specifically provided for liquidated damages in the sum of forty-five dollars for each calendar day of delay. Liquidated damages of this character, recoverable *independent of proof* of damages, are given statutory recognition in the law of public contracts. 40 U.S.C.A. 269.

"The Courts have also recognized them when embodied in public contracts without any direct sanction of law. *United States v. Bethlehem Steel Co.*, 1907, 205 U.S. 105, 119, 27 S.Ct. 450, 51 L.Ed. 731; *Six Companies v. Joint Highway Dist. No. 13*, 9 Cir. 1940, 110 F. (2d) 620, 625. Where the intention of the parties is clear, the application of the penalty will be sustained.
* * *

Neither the Department of Commerce nor the Civil Aeronautics Administration was listed by Duby as a creditor arising out of this contract.

The bankruptcy petition was filed June 28, 1945, and the adjudication was made on June 30, 1945, (Ex. 11 and 7) although Duby knew as early as January 16, 1945, (Ex. 13) that the United States would claim "liquidated damages" for delay at the

rate of \$20.00 per day, he did not list plaintiff or the Department as a creditor in the schedule of creditors, and there is no showing here that either the Department of Commerce, the Civil Aeronautics Administration or the plaintiff had any notice or knowledge whatever of the pendency of the bankruptcy proceedings to bring them or either of them within the provisions of the Bankruptcy Act (Sec. 35, Title 11) dealing with discharge.

That part of Section 35 here involved provides that a discharge in bankruptcy shall release a bankrupt from all of his provable debts *except* such as “ * * * *have not been duly scheduled in time for proof and allowance, with the name of the creditor* * * * *unless such creditor had notice or actual knowledge of the proceedings in bankruptcy.*”

We are not entirely without authority for the proposition that the burden of proof is upon the appellee to show that we “had notice or actual knowledge of the proceedings in bankruptcy” so as to bring us within the exception of the quoted section of the Bankruptcy Act because in the early case of *Hill et al v. Smith*, 260 U.S. 592, the late Mr. Justice Holmes, speaking for the court in connection with this very section said:

“By the very form of the law the debtor is discharged subject to an exception, and one who would bring himself within the exception must offer evidence to do so. *Kreittein v. Ferger*, 238 U.S. 21, 26. *McKelvey v. United States*, 253. But there is an exception to the exception ‘unless the creditor had notice’ and by the same principle if the debtor would get the benefit of that he must offer evidence to show his right. We agree with the Court below that justice and the purpose of the Section justify the technical rule that if a debtor would avoid the effect of his omission of a creditor’s name from his schedules he *must prove the facts upon which he relies.*”

The record in this case is absolutely barren of any proof of notice or knowledge on the part of appellant of the pendency of the bankruptcy proceedings while the bankruptcy file (Ex. 11) clearly shows that the bankrupt did not list this claim.

The defenses interposed by the appellee Surety Continental Casualty Company and the burden of the authorities they will undoubtedly rely upon is that this \$20.00 per day is a penalty and therefore dischargeable in bankruptcy, but the authorities herein cited from this court as well as from the United States Supreme Court are to the contrary.

Appellee takes the position that it was released from its obligations under the performance bond by the acts of the Government. To this we can only refer again to the terms of the agreement between

the parties contained in Article 9 (Ex. 3) to which appellee Surety is a party.

There is no place in this case for invoking the doctrine of estoppel. It is not pleaded and is therefore not available to appellee even if the doctrine could be asserted against the Government, which we contend it cannot.

CONCLUSION

From the foregoing it is respectfully submitted that the district court erred in its finding with respect to notice to the Surety and its conclusion of law based upon that finding and the judgment should be reversed with directions to enter judgment against the appellee Surety in the amount of \$1680.18.

Respectfully submitted,

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United States Attorney

JOHN E. BELCHER
*Assistant United States Attorney
For Appellant*

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant,*

— vs. —

PAT DUBY, doing business as Pat Duby Company,
and CONTINENTAL CASUALTY COMPANY, a
corporation, *Appellees.*

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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& UHLMANN,

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United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant*,

vs.

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Company, and CONTINENTAL CASUALTY
COMPANY, a corporation, *Appellees*.

No. 13138

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

SUPPLEMENT TO GOVERNMENT'S STATEMENT OF THE CASE

The government has fairly and accurately stated the facts of the case except that Appellee does not of course agree with the conclusions set forth in the last two paragraphs on page 4 of Appellant's brief. There are, however, some additional facts which should be brought to the attention of the court.

Prior to the awarding of the contract to Duby for the sum of \$6,602.70, Pat Duby and his estimator examined the site of the job on or about August 15, 1944. The contract was for the construction of four concrete check dams and one twin-barrell concrete box culvert at Seattle-Tacoma Airport, which is just south of the City of Seattle. At the time of such examination, the

ground was normal and there was only a very small trickle flowing down the gulley wherein the construction was to be made (Tr. 123, 124).

The contract was let by the United States to Pat Duby and notice to proceed was given on October 6, 1944 (Ex. 5). Upon commencement of the work by Pat Duby, torrents of rain in unprecedented amounts descended upon the job (Tr. 126, 147) and the entire project became a sea of mud. As the excavation work commenced, quick-sand was encountered along the entire construction area (Tr. 126, 149-150). Pat Duby continued to carry out the terms of his contract despite the adverse elements and the greatly increased expense (Tr. 128-129) because he wanted to complete the job (Tr. 124). The government engineer superintending the work indicated that Duby would be awarded an extension of time and additional funds (Tr. 130).

Pat Duby expended in the performance of the contract a total sum of \$17,687.02 (Ex. 14, Tr. 131) and in addition thereto, Continental Casualty Company, as surety upon the payment bond of Pat Duby paid to labor and material claimants the full amount of such payment bond in the sum of \$3,397.00 (Defendant's Ex. A-2).

The government's claim in this action for liquidated damages at the rate of \$20 per day commenced to accrue November 20, 1944, and terminated with the completion of the job on April 2, 1945 (Tr. 34-Findings, Paragraph VIII).

Contract payments were made by the government

to Pat Duby in installments as the work progressed. The first payment was made in December, 1944, and all remaining payments to the full extent of the contract were made subsequent to that date, except that out of the final settlement the government withheld from Pat Duby the sum of \$979.82 as a partial offset against the liquidated damages claimed by the government (Tr. 133-134).

The United States was in no way damaged by the delay of Pat Duby in completing the contract (Tr. 85, 105).

Following the submission of briefs and full argument of the matter the trial court entered its Findings of Fact and Conclusions of Law (Tr. 31) and entered Judgment of Dismissal both as to Pat Duby and as to Continental Casualty Company (Tr. 40). Appellant in its opening brief has moved to dismiss its appeal as to Pat Duby.

ARGUMENT OF APPELLEE, CONTINENTAL CASUALTY COMPANY

Appellant having moved to dismiss from this appeal Appellee, Pat Duby, the arguments commencing with the last paragraph on page 17 of Appellant's brief and continuing through the middle of page 19 of Appellant's brief become immaterial and inapplicable to the issues on this appeal.

Continental Casualty Company does not contend nor take the position that it was released from liability as surety by virtue of Pat Duby's discharge in bankruptcy. It is clear under Section 16 of the Bankruptcy Act of 1938 that a surety is not released by

the discharge of its principal in bankruptcy and Continental Casualty Company does not so contend.

Appellant assigned as error only two particulars. The first is with reference to Finding XII to the effect that Continental Casualty Company had no notice of the government's claim for liquidated damages resulting from delay in the performance of the contract by Duby until September 11, 1946. Under the theory on which this case was tried on behalf of Continental Casualty Company such finding is immaterial and is unnecessary to support the judgment of dismissal. Nevertheless, Appellee is of the opinion that each and all of the Findings are fully supported by the evidence in the record.

The defense of Continental Casualty Company to the claim for liquidated damages by the government is twofold. First, the claim of the government is in the nature of a penalty and therefore not recoverable; and second, Continental Casualty Company as surety upon the performance bond of Pat Duby was released by the acts of the government. The trial court rendered its decision in favor of Continental Casualty Company under the latter point.

Liquidated Damages or Penalty

It is conceded that the authorities are in direct conflict on this particular question. Still, we believe that the better rule is that a clause in a contract calling for a penalty or liquidated damages will not be enforced where no damage whatever has been sustained. Nor will such clause be enforced where the sum named in the contract to be paid on a breach is wholly dispro-

portionate to the damage actually sustained. It will be observed that the total contract price was \$6,602.70 and that the government's claim is for the sum of \$2,660.00, which is in excess of 40% of the contract price. Such cases will deem the parties to have intended to stipulate for a mere penalty to secure performance.

The following authorities sustain this rule:

Rispin v. Midnight Oil Co. (1923—Ninth Circuit) 291 Fed. 481, 34 A.L.R. 1331 at page 1334:

"The next point concerns the clause of the contract providing for liquidated damages. Keeping in mind that the complaint does not allege that plaintiff has suffered any damage, and that the defendant's answer expressly avers that plaintiff did not suffer any damage at all, it is not necessary to decide whether the clause is to be read as a penalty or as one for liquidated damages, for the reason that, even granting that it must be read as for liquidated damages, it will not be enforced were no damage whatever has been sustained. In *Northwest Fixture Co. v. Kilbourne & C. Co.*, 62 C.C.A. 638, 128 Fed. 256, this court considered an agreement which contained a provision that, in the event either party should fail to keep its agreement, the party thus in default should pay to the other party the sum of \$10,000 as liquidated damages. Judge Gilbert, for the court, said: 'Conceding the rule to be that, in order to recover a sum as liquidated damages, it is unnecessary to prove actual damage, it is also true that no provision in a contract for the payment of a fixed sum as damages, whether stipulated for as a penalty or as liquidated damages,

will be enforced in a case where the court can see that no damages have been sustained. It is the general rule that, where the sum named in the contract to be paid on a breach thereof is evidently wholly disproportionate to the damage actually sustained, or where it is shown that no actual damage has been sustained by the breach the courts will deem the parties to have intended to stipulate for a mere penalty to secure performance'."

See also:

The Colombia, 197 Fed. 661;

Northwest Fixture Co. v. Kilbourne & Clark Co., 62 C.C.A. 638, 128 Fed. 256;

In re Gelino's, 43 F.(2d) 832.

Again the rule is well stated in 34 A.L.R., page 1336, as follows:

"The tendency and preference of the law is to regard a stipulation or covenant for the payment of a specified sum upon the breach of the contract as in the nature of a penalty, rather than as liquidated damages, since it may then be apportioned to the loss actually sustained, and compensation made according to justice and right; although, where the circumstances and the nature of the contract are such that actual damages cannot be ascertained with any degree of certainty, the stipulation will be regarded as one for liquidated damages. 8 R.C.L., p. 564, §114. Whether the loss actually suffered bears a reasonable proportion to the amount stipulated must be taken into consideration in determining if that amount is a penalty or liquidated damages, so that a sum stipulated, not disproportionate to the damages likely to result, is a stipulation for

liquidated damages, while if the stipulation is so large as to be out of proportion to the probable or presumptive loss, it is regarded as a penalty, especially if the damage resulting may be easily ascertained, * * *."

The Surety Continental Casualty Company Was Released from Its Obligation Under Its Performance Bond by Acts of the Government.

I.

The government upon completion of the contract by Mr. Doby accepted the same as completed. Such acceptance without reserving its rights against the surety under the performance bond precludes the government's right to recover the penalty for delay.

The general rule set forth in 43 Am. Jur. 917, §178 (Public Works) is as follows:

"It is the general rule that acceptance by the public authorities of work done under a construction contract prevents such public authorities from subsequently recovering upon the contractor's bond for any breach of contract in the absence of anything to show such acceptance and final settlement were procured through fraud or mistake."

With reference to the question as to when Continental Casualty Company was first notified as to the possibility of a claim by the government for liquidated damages for delay by Doby in completing the contract, it must be remembered that in connection with this contract the surety, Continental Casualty Company, had also issued a payment bond. It was in this connection that Mr. Bruce wrote Exhibit 6, being a

letter dated March 6, 1945, to the Civil Aeronautics authorities asking that the government withhold further progress payments or settlement funds from Mr. Duby. The government answered (Exhibit 6) by letter dated April 19, 1945, advising that the inspection of work contracted for had been made and the work accepted. The government did not in such letter or in any other letter until Exhibit 18-B (dated September 11, 1946), advise Continental Casualty Company of its claim for liquidated damages. This is further borne out by letter Exhibit 18-A. Mr. Bruce's testimony (Tr. 158) is to the effect that the first notice which he had of any claim by the government for liquidated damages was contained in Exhibit 18-B, letter of September 11, 1946.

The effect of the government's failure to notify Continental Casualty Company of this purported claim for liquidated damages until almost a year and a half after the completion and acceptance of the work was to greatly prejudice the surety in view of the fact that in the meantime the principal, Pat Duby, went into bankruptcy and the surety not knowing of the government's claim did not file a claim in the bankruptcy proceeding for this particular item. The bankruptcy file will show a claim by Continental Casualty Company but that was for reimbursement for payment made under its payment bond to laborers and materialmen.

In this connection, we cite *Munroe v. National Surety Co.*, 47 Wash. 488, 92 Pac. 280, wherein it is stated at page 491 as follows:

"This court has repeatedly held that a failure

to give notice in this class of cases is only a defense in so far as the surety has been damaged or prejudiced by such failure. *Heffernan v. United States Fidelity, etc.*, 37 Wash. 477, 79 Pac. 195; *Trinity Parish v. Aetna Indemnity Co.*, 37 Wash. 515, 70 Pac. 1097; *Denny v. Spurr*, 38 Wash. 347, 80 Pac. 541. In the case at bar the contract was to be completed on or before September 15th, and the first notice of default was given November 22d. Failure to give notice at an earlier date would release the bonding company from any claim for demurrage or for failure to complete the building on time, but not for damages arising from lien claims for labor or material. Cases above cited."

It appears to us that the government's position from a legal, moral and equitable standpoint is without foundation. The government received a completed job into which was poured in excess of \$20,000 by the contractor, Pat Duby, and the surety upon his payment bond. The job was completed by the contractor despite adverse weather conditions and the encountering of quicksand for all of which the government paid only the contract price of \$6,602.70. It would seem hardly fair or equitable that under the circumstances that the government now be allowed to recover liquidated damages for delay in the completion of the contract.

II.

The government is claiming a penalty of \$20 per day for delay in completion of the contract from November 20, 1944, until April 2, 1945. The evidence is undisputed that the first payment under the contract

was made in December, 1944, which, of course, is subsequent to the date on which the government claims the liquidated damages began to accrue. *During all of the time from December, 1944, until the completion and acceptance of the contract the government was making payments as the work progressed to the contractor, Pat Duby. Yet at no time did the government exercise its right to withhold and set off the amount of the penalty as the same accrued against the progress payments, all to the prejudice of the surety, Continental Casualty Company. The failure of the government to exercise its right to set off and withhold payments to the contractor prejudiced the rights of the surety, particularly, in view of the fact that during the interim the contractor became insolvent and went into bankruptcy.*

The rule which releases the surety under such circumstances is clearly set forth in 50 Am. Jur. 976, §109, wherein it is stated:

“A surety is entitled to be subrogated to the benefit of all the securities and means of payment under the creditor’s control, and so, in the absence of assent, waiver, or estoppel, he is generally released by any act of the creditor which deprives him of such right. The creditor must for a surety’s benefit apply to his debt all moneys and securities of the principal within his control which he has the right to apply, and if he voluntarily surrenders or releases the same, the surety is discharged *pro tanto*.” (Citing many cases)

The rule is again well stated in the annotation found in 115 Am. St. Rep. 95, as follows:

“It is the duty of the creditor where he holds

property of the principal in his possession as security for the principal's obligation, not to release such property upon penalty of discharging the surety to the extent of the property so released. The position of the creditor under such circumstances is in the nature of a trustee for all parties (citing many cases) * * *

"A surety upon the bond given as indemnity against defective work under the construction contract can only be released by some positive act done by the owner to the prejudice of the surety such as acceptance and payment with knowledge of some act which would imply connivance amounting to fraud (citing cases). Positive acts of negligence on the part of the creditor in making payments which he had the right under a building contract to withhold will in some cases release the surety (citing cases) * * *

"Hence the general rule is that where the creditor has within his control funds of the principal debtor which may properly be applied to the payment of the obligation, but fails to do so, the surety is discharged (citing cases)."

In *Brown v. First National Bank*, 132 Fed. 450, at page 455, the court said:

"The wrongful surrender of collateral security by a creditor without the knowledge of the sureties for the payment of the debt discharged them from liability therefor entirely or *pro tanto* according to the value of the security thus surrendered."

The element of estoppel enters into the application of the foregoing rules as it is only just and proper that where the creditor had the right and opportunity to withhold funds in its hands but pays them over to

the principal and later makes a claim against the surety, the equitable principle of estoppel enters for the protection of the surety.

In this connection the rule is well stated in 50 Am. Jur. 975, §108:

“The doctrine of estoppel may, in proper circumstances, be invoked to prevent a creditor from asserting any liability against the surety, as where the surety, relying upon a statement of the creditor that the debt has been paid, is induced thereby to change his position, to his injury, or where the creditor releases the surety, or leads him to believe that he has been released, and thereby induces him to release the principal, or to forego taking steps to protect himself against loss on his contract of suretyship.”

The foregoing rules were applied in a charge to the jury and affirmed by the Supreme Court of Oklahoma (1913) in the case of *Johnson v. Jones*, 135 Pac. 12 (Headnote 2).

These rules are recognized by the Restatement of the Law of “Security,” Chapter 5, Paragraph 132, wherein it is stated:

“If the creditor surrenders the security or impairs its value, he loses or diminishes the value of an asset which might otherwise be used to satisfy his claim against the principal, and reduces the value of the security to which the surety is entitled upon his own performance. The surety is consequently entitled to a reduction in his obligation to the extent of the value of the lost security.”

The Washington State Supreme Court likewise adheres to the foregoing rules. In the case of *City of*

Tacoma v. Peterson, 174 Wash. 621, the court states at page 625 (25 P.(2d) 1034):

“The respondent surety, upon the other hand, urges that it is a well-settled rule at law that, when the rights of a surety are involved, the obligee must deduct from the payments any sum owing to it, otherwise the surety will be discharged, citing *Wood v. Brown*, 104 Fed. 203; *Commonwealth v. Vanderslice*, 8 Serg. & Raw. (Pa.) 451; *Clow v. Derby Coal Co.*, 98 Pa. 432, and a considerable number of cases from other courts that seem to so hold.

“While we are satisfied that this is the general rule and the correct rule to apply in this case, we have another reason for applying it, * * *.”

The rules above cited releasing the surety under circumstances as are present in this case are in the nature of estoppel.

The principle of estoppel is applicable against the United States government when such government is acting in its proprietary capacity. In the present case the United States government acting through the Civil Aeronautics Administration contracted with defendant, Duby, for the construction of four concrete check dams and one twin barrel concrete box culvert near the Seattle-Tacoma Airport at Seattle. The contracting for the control of drainage in a local area is certainly acting within its proprietary capacity and has no relation to governmental functions. The rule is stated in 19 Am. Jur. 922, §169 as follows:

“So far, however, as the United States acts in a proprietary capacity or enters into contractual relationship, an estoppel may be exerted against it provided the functions of the govern-

ment are not impaired thereby. In other words, the law of estoppel in a proper cases applies to the government."

Branson v. Wirth, 17 Wall. (U.S.) 32.

CONCLUSION

It is apparent that the surety, Continental Casualty Company, has been discharged by reason of the government's acts in failing to withhold for its own benefit payments which were being made to Pat Duby at the very time that the government purported to be claiming a penalty for delay in the performance of the contract. Under the rules stated above such acts on the part of the government constitute a discharge of the surety under its bond and this court should affirm the decision of the trial court in that regard.

Respectfully submitted,

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No. 13138

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HONORABLE JOHN C. BOWEN, *Judge*

APPELLANT'S REPLY BRIEF

J. CHARLES DENNIS,
United States Attorney

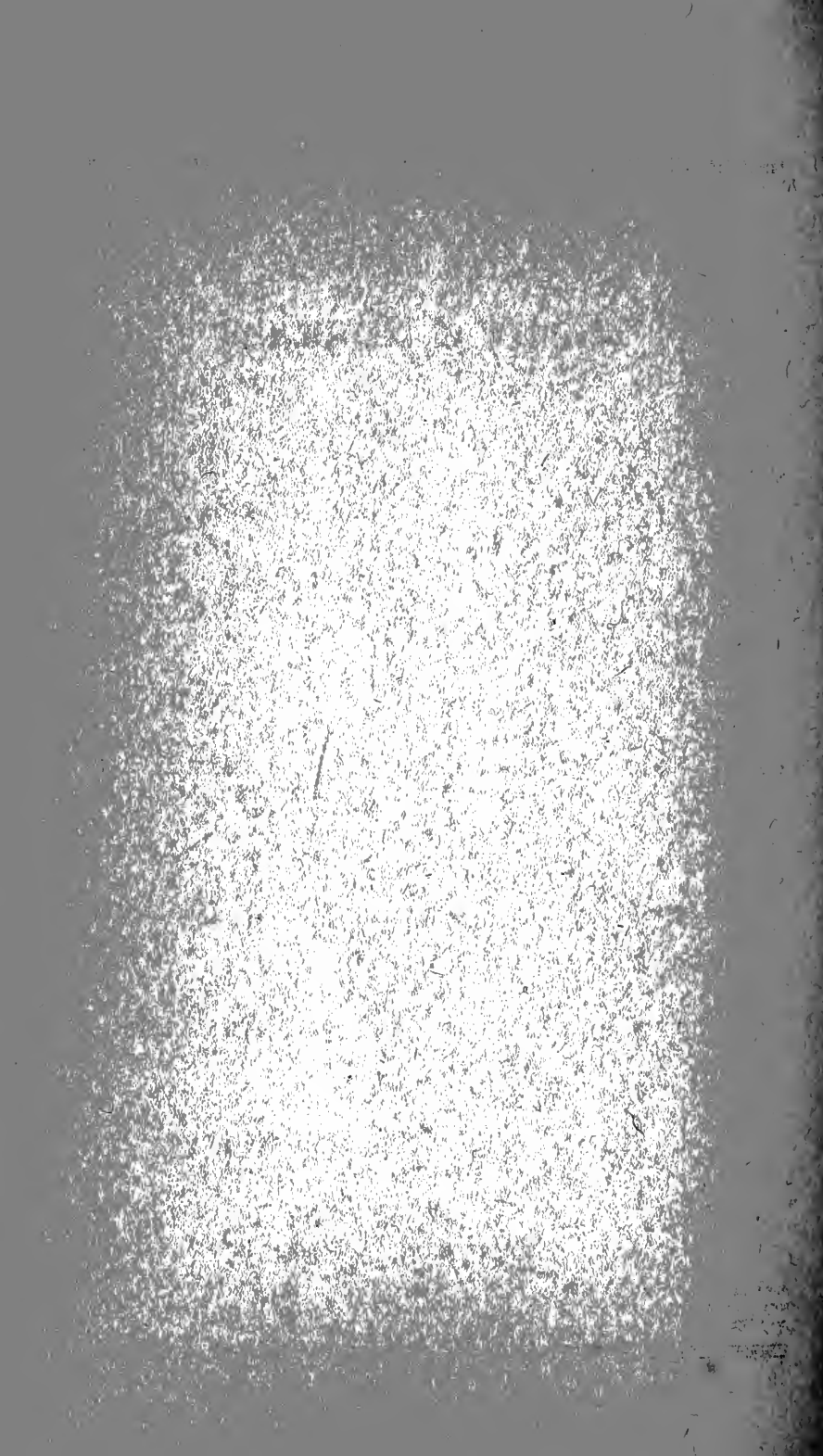
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No. 13138

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant

VS.

PAT DUBY, doing business as Pat Duby
Company, and Continental Casualty
Company, a corporation,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

APPELLANT'S REPLY BRIEF

J. CHARLES DENNIS,
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Appellant does not agree that because of its motion to dismiss Pat Duby from this appeal that the argument commencing with the last paragraph on page 17 of appellant's brief and continuing through the middle of page 19, becomes immaterial.

To establish the liability of the surety, we of course must first establish the liability of the principal on the bond. That is all that argument is directed to.

The Continental Casualty Company frankly admits (p. 3 of its brief) that it was not released from liability as surety by virtue of Duby's discharge in bankruptcy.

It is argued that the claim of the government is in the nature of a penalty and therefore not recoverable, and secondly that Continental Casualty Company, as surety on the performance bond was released by the acts of the Government.

LIQUIDATED DAMAGES

On the first point, reliance is placed on four cited cases, chief among which is *Rispin v. Midnight Oil Company* (Ninth Circuit) 291 Fed. 481, 34 A.L.R. 1331 at p. 1334.

It will be our purpose to analyze these four cases and endeavor to point out wherein the instant case differs.

At page 14 of our opening brief we mentioned the Rispin case, expecting reliance thereon by appellee and pointed to the fact that that was one between pri-

vate parties, while here "public interest is involved" wherein a different rule obtains (citing cases).

A case from this court wherein the public interest was involved and establishing the rule contended for by us in *Six Companies v. Joint Hiway District No. 13*, 110 F. (2d) 621, in which this court followed the rule laid down by the United States Supreme Court in *United States v. Bethlehem Steel Company*, 205 U.S. 105, 51 L.Ed. 731.

On certiorari the *Six Companies* case, *supra* was reversed on the sole ground, as stated in the opinion. "The Circuit Court of Appeals should have followed the decision of the District Court of Appeals of California in *Sinnott v. Schumacher*, 45 Cal. App. 46. The question involved is: what is the law of California? * * * Had this case been tried in any superior (trial) court of California, such court would have been bound by *Sinnott v. Schumacher*, and the result would have been the opposite of that announced by the Circuit Court of Appeals. If therefore, the state law is to be determined just as it would be in a case tried in the state courts, we can not escape the conclusion that the decisions of the California District Courts of Appeals are binding on the federal courts."

Here, we have no such situation, because there is no such rule or statute in the State of Washington

where the contract in question was to be performed, as obtains in the State of California. In fact the rule and decisions in the State of Washington are in conformity with this 9th Circuit view (30 Wash. 178).

The other cases cited and relied upon by appellee, as well as the quotation from 34 A.L.R. p. 1336 have no bearing whatever on the rule applicable to public contracts.

The author of the annotations at page 1336 A.L.R., has this to say about liquidated damages.

“Liquidated damages are amounts settled and agreed upon in advance, to avoid litigation as to damages actually sustained, they may exceed or fall short of the actual damages sustained, but *the sum thus determined in advance binds both parties to such agreement.*” (Italics ours)

citing as authority:

Pacific Hardware & Steel Co. v. United States
(1913) 48 Ct. Cl. (Fed.) 399.

We rely of course, on those cases dealing with public construction contracts, such as *United States v. Bethlehem Steel Co.*, cited in our opening brief, where, at page 1343 of 34 A.L.R. the author in referring to that case said:

“The court stated that the fact that practically no damage accrued to the government on account of the failure to deliver the gun carriages could

not affect the meaning of the clause for liquidated damages, or render its language substantially worthless for any purpose of security for the proper performance of the contract as to the time of delivery."

This has been the rule in the State of Washington as annunciated by the State Supreme Court as early as 1902, as indicated by the decision in the case of *American Copper, Brass & Iron Works v. Galland-Burke Brewing & Malting Company*, 30 Wash. 178, where it was held under a contract for liquidated damages, it is not necessary to show in what manner or to what extent the party claiming thereunder has been actually damaged, but upon establishing a breach of the condition entitling him to such damages he should be awarded the stipulated sum.

RELEASE OF SURETY

On the second point argued by appellee to the effect that the Casualty Company was released from its obligation under its performance bond.

Counsel argues that because the government on completion of the work accepted it as completed without reserving its right against the surety under the performance bond precludes the right of the government to recover the liquidated damages agreed to be paid in case of delay.

The argument is ingenious, to say the least, and no authority is cited to sustain the point, except a general rule cited from 43 Am. Jur. 917, §178 (Public Works).

The exception to this general rule is contained in Federal law (T. 40 § 269 U.S.C.), where the Congress has specifically provided that in all contracts for construction that "a stipulation shall be inserted for liquidated damages for delay" further providing that " * * * in all suits commenced on any such contracts or on any bond given in connection therewith it shall not be necessary for the United States, whether plaintiff or defendant, to prove actual or specific damages sustained by the government by reason of delays, but such stipulation for liquidated damages shall be conclusive and binding upon all parties." (Italics ours)

This rule was applied in the Consolidated Engineering case cited in our opening brief (35 F. Supp. 980) from which an appeal to this court was taken but subsequently dismissed on appellee's motion (123 F. (2d) 1015).

Appellee, on this point cites as additional sustaining authority the case of *Monro v. National Surety Co.*, 47 Wash. 488.

That case involved the surety on a building contract between private individuals, and from the opinion we note, at page 491 that no notice to the surety was given of the default — the bond there involved evidently providing for such notice.

Here, however, there was an express waiver of notice to the surety, the performance bond reading:

“Now therefore, if the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, *with or without notice to the surety*, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modification to the surety being hereby waived, then this obligation to be void, otherwise to remain in full force and virtue.” (Ex. 3 R.).

There is no provision in the bond in this case for notice to the surety, such as contained in the bonds involved in the Washington cases, especially in the case of *Heffernan v. United States Fidelity, etc.*, 37 Wash. 477, cited and referred to in the *Monro case*, *supra*, relied upon by appellee, so the question of notice to the surety in this case was not required.

The Washington cases cited by appellee on the question of surrender of collateral are inapposite in a case of this nature.

It is argued by appellee at page 13 of its brief that the principal of estoppel set out in its brief are applicable against the government acting in its proprietary capacity. The fallacy of this argument is at once apparent when the nature of the work involved — drainage — is considered. This work was contracted for in the public interest and was therefore being done in a governmental and not a proprietary capacity.

Finally, appellee cites as sustaining authority for his argument on the subject of estoppel the case of *Branson v. Wirth*, 17 Wall. U.S. 32 (21 L.Ed. 566).

That was an equitable action in ejectment for the recovery of real estate. The holding of the Supreme Court was simply that an equitable estoppel is not available in an action of ejectment where the title is in issue.

In the light of the plain provisions of the Statute (T. 40 § 269 United States Code) there is not and can be no estoppel against a claim of the government for liquidated damages, under a written contract pro-

viding therefor. The provisions of the statute relied upon by us is quoted at page 12... hereof.

CONCLUSION

Counsel having argued no other points it is respectfully submitted that the judgment of the District Court should be reversed and remanded with direction to enter judgment against appellee Continental Casualty Company as surety on the performance bond.

Respectfully submitted,

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